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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 700.

PHILEMON B. HAWKINS, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

(23)

FILED MAY 29, 1877.

Nov 3 1877
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Jno Gibson

SUPREME COURT OF THE UNITED STATES.

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1 In the United States Court of Claims.

PHILEMON B. HAWKINS
vs.
THE UNITED STATES.
} No. 10,706.—Filed Oct. 11, 1875.—J. R.

The petition of Philemon B. Hawkins, a citizen of the State of North Carolina, respectfully shows:

First. That on the 15th day of May, 1874, he entered into a contract with the United States, whereby he agreed to furnish one thousand cubic yards (more or less) of rubble-stone for the United States, at Raleigh, for the court-house and post-office building in said city, at and for the sum of $5 per cubic yard. Said stone was to be equal to a sample submitted by the plaintiff at the time he made his proposal, and was to be of sizes described in the contract. The stone was to be delivered at such times and in such quantities as might be deemed necessary by the superintendent of the
2 said building. A copy of said contract is hereto annexed, marked Exhibit "A," and referred to as a part of this petition.

Second. The plaintiff immediately made his arrangements to fulfill his agreement, and at great expense began to quarry and ship stone to Raleigh, of the character required by the terms of the contract and like the sample exhibited by him, and to deliver the same at the site of the said building. After he had delivered at the site of said building a large quantity of rubble-stone of the kind required by the contract, the officers of the United States refused to accept the same, and he was by the said officers of the United States in charge of said building directed and required to remove the stone so delivered, and was by them directed to quarry and deliver, in lieu of rubble-stone, what is known as dimension-stone, the latter being a much larger and more expensive kind of stone.

Third. In obedience to said directions the plaintiff immediately removed the rubble-stone from the building and
3 proceeded to quarry and deliver, in lieu thereof, at the site of said buildings, large quantities of dimension-stone; and on or before the 20th day of December, 1874, the plaintiff delivered at the site of said building, in the city of Raleigh, seven hundred and sixty-seven (767) cubic yards of dimension-stone, all of which were accepted by the United States, and were used in the construction of said building. The dimension-stone so delivered by the plaintiff was reasonably worth the sum of $12.50 per cubic yard.

Fourth. At the time the plaintiff was ordered to remove the rubble-stone and deliver dimension-stone instead thereof, he had delivered at the site of said building fifty cubic yards of rubble-stone, and had quarried and prepared ready for shipment two hundred and thirty (230) cubic yards.

Fifth. The United States have paid the plaintiff, on ac-
4 count of said stone so delivered, the sum of $3,865.

Sixth. The rubble-stone removed from the site of the building, and that in the quarry ready for shipment, was worth the sum of $330, and not more.

The plaintiff, therefore, prays judgment against the United States for the sum of $6,447, according to the following specification of items, that is to say:

1. For 767 cubic yards of dimension-stone, at $12.50 per cubic yard		$9,587 00
2. For fifty cubic yards of rubble-stone, at $5 per cubic yard		250 00
3. For quarrying 230 cubic feet of rubble-stone (not shipped), at $3.50 per cubic yard		805 00
		$10,642 00
The United States are entitled to credit for cash	$3,865 00	
For value of rubble-stone removed from yard and that in quarry not shipped	330 00	
		4,195 00
Balance due		$6,447 00

Seventh. The petitioner has applied to the proper officer of the United States Treasury Department for payment of his said claim, but said officers allowed him only a small part thereof, which he refused to accept.

PHILEMON B. HAWKINS,
Louisburg P. O.,
Franklin Co., N. C.

ENOCH TOTTEN,
Solicitor for Plaintiff,
Washington, D. C.

STATE OF NORTH CAROLINA, }
COUNTY OF WAKE. } *ss.*

I, Philemon B. Hawkins, being first duly sworn, do depose and say, that I have read the foregoing petition by me subscribed, and that no assignment or transfer of said claim, or any part thereof, has ever been made; that I am the sole owner thereof, and that I am justly entitled to the amount claimed in said petition from the United States, after allowing all just credits and offsets, and I believe the facts stated in said petition are true.

PHILEMON B. HAWKINS.

Subscribed and sworn to before me, this 8th day of October, 1875, by Philemon B. Hawkins.

CHAS. ROOT, *Notary Public.*

6 *Exhibit A.*

Contract between the United States of America and Philemon B. Hawkins, of Louisburg, N. C.

This contract made and entered into by and between William A. Hearne, superintendent of the construction of the U. S. court-house and post-office at Raleigh, N. C., for and in behalf of the United States of America, of the first part, and Philemon B. Hawkins, a resident of Louisburg, Franklin county, North Carolina, to whom was awarded the contract for furnishing and delivering on the site of the U. S. court-house and post-office at Raleigh one thousand (1,000) cubic yards (more or less) of rubble-stone, on his bid for the same, received under advertisement dated July 21, A. D. 1873, of the second part, witnesseth:

That the party of the second part covenants and agrees to and with the party of the first part to furnish and deliver on the site of the court-house and post-office at Raleigh, N. C., one thous-
7 and (1,000) cubic yards (more or less) of rubble-stone, said stone to be in every way equal to the sample furnished with his bid, one-quarter to be bond-stones of a length equal to the thickness of the walls and to contain not less than ten (10) cubic feet, and no stone to contain less than one and one-half (1½) cubic feet or to be less than twelve (12) inches thick, and said stone to be delivered at such times and in such quantities as may be deemed necessary by the superintendent, and in full accordance with the advertisement and proposal hereto attached and forming a part of this contract.

And the said party of the first part, acting for and in behalf of the United States, doth covenant, promise, and agree to pay or cause to be paid unto the said party of the second part, or to his heirs, executors, administrators, or assigns, in lawful money of the United States, the sum of five dollars ($5.00) per cubic yard; the stone to be measured in the wall, net measurement only to be allowed. Payments to be made in the following manner, viz:

Ninety per cent. (nine-tenths) of the value of the stone delivered on the site of the building will be paid from time to time in
8 monthly payments as the work progresses, (the said value to be ascertained by the superintendent,) and ten per cent. thereof (one-tenth) will be retained until the completion of the contract and the approval and acceptance of the same by the superintendent, which amount shall be forfeited by said party of the second part in the event of the non-fulfillment of this contract to the entire satisfaction of said superintendent.

It is further covenanted and agreed by and between the parties of this contract, that if, from any cause whatever, the said party of the second part should fail in required promptness in the delivery of the said stone by or within the time or times specified above, it shall become the duty of the said superintendent, and he shall be, and hereby is authorized and empowered, after eight days due no-

tice thereof, in writing, served personally upon, or left at the shop, office, or usual place of abode of the said party of the second part, or with his agent, without effect, to purchase and supply any deficiency of stone caused by the delinquency of the said party of the second part, and the actual cost thereof, together with fifteen
9 per cent. thereon, shall be deducted from any moneys due or owing to the said party of the second part on account of this contract; and if that amount be not due him, then his bondsmen are to be held liable for any deficiency, to be recovered of them by suit in the name of the United States: or the said party of first part may elect that if the party of the second part should fail to complete the said contract by or within the time or times specified above, that he shall forfeit the sum of fifty ($50) dollars per diem for each and every day thereafter until the final completion of the contract, which sum shall be deducted from any moneys which may be due him; and if that amount be not due him, then his bondsmen are to be held liable for any deficiency, to be recovered of them by suit in the name of the United States.

It is further covenanted and agreed between the parties to this contract, that the party of the second part shall execute, with two or more good and sufficient sureties, a bond to the United States in the sum of one thousand ($1,000) dollars conditioned for the faithful performance of this contract, and the agreements and covenants herein made by the said party of the second part.

10 It is also covenanted and understood that no member of Congress, or other person whose name is not at this time disclosed, shall be admitted to any interest in this contract; and it is further covenanted and agreed that this contract shall not be assigned except by consent of the Secretary of the Treasury; and that any assignment thereof, except as aforesaid, will be a forfeiture of the same.

It is further covenanted and agreed by and between the parties hereto, that this contract shall be valid and binding when approved by the Secretary of the Treasury, and not otherwise, and no departure from its conditions shall be made without his written consent.

In witness whereof, the parties hereto have hereunto subscribed their names and affixed their seals, this 15th day of May, A. D. 1874.

WM. A. HEARNE.

Witnesses to the signature of the superintendent:

JOHN STELMAN,
THEO. N. RAMSAY.

PHILEMON B. HAWKINS.

Witnesses to the signature of the contractor:

J. J. SAWYER,

11 In the Court of Claims of the United States.

PHILEMON B. HAWKINS
vs.
THE UNITED STATES. } No. 10,706.—December Term, A. D. 1874.

And now comes the attorney-general, on behalf the United States, and makes answer to the petition of the claimant herein, and, not confessing the same, or any part thereof, denies each and every allegation therein contained, and calls for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the United States are indebted to the said claimant in the sum of six thousand four hundred and forty-seven dollars, says that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said government, denies the said allegation.

THOMAS SIMONS,
Assistant Attorney-General.

Filed October 21, 1875.

12 United States Court of Claims.

PHILEMON B. HAWKINS
vs.
THE UNITED STATES. } No. 10,706.

And now comes the said plaintiff and moves the court for leave to amend his original petition herein, as follows, to wit:

1. By striking out the words and figures "seven hundred and sixty-seven (767)" wherever they appear therein, and substituting in lieu thereof the words "nine hundred and sixty-five (965)."

2. By claiming judgment for $8,962.50 and by changing the specifications of the items of his claim so as to read as follows:

For 965 cubic yards of stone, @ $12.50		$12,062 50
For 50 cubic yards of rubble-stone delivered, @ $5		250 00
For 230 cubic yards rubble-stone prepared for delivery but not shipped, @ $3.50		805 00
		$13,117 50
Credits.		
For cash	$3,825 00	
For value of rubble-stone rejected and in quarry not shipped	330 00	
		$4,155 00
Balance due		$8,962 50

13 ENOCH TOTTEN,
Attorney for Plff.

Filed and allowed December 29, 1876.

In the Court of Claims.

PHILEMON B. HAWKINS
vs.
THE UNITED STATES. } No. 10,706.

At a Court of Claims held at the Capitol, in the city of Washington, the 12th day of February, A. D. 1877, judgment was ordered up as follows:

The court, upon due consideration of the premises, find in favor of the claimant, and do order, adjudge, and decree, that the said Philemon B. Hawkins, claimant, do have and recover of and from the United States the sum of one thousand five hundred and sixty-six dollars and ninety-five cents ($1,566.95).

BY THE COURT.

A true copy of record.

14 In the Court of Claims.

PHILEMON B. HAWKINS
vs.
THE UNITED STATES.

And now comes the said plaintiff and appeals to the Supreme Court of the United States from the judgment rendered in the above-entitled cause, and prays that his said appeal may be allowed.

ENOCH TOTTEN,
Atty. for Plaintiff.

Filed March 13, 1877.

Ordered, That the appeal be allowed as prayed for.

BY THE COURT.

15 Court of Claims.

PHILEMON B. HAWKINS
vs.
THE UNITED STATES.

Findings of fact by the Court.

1. The contract, a copy of which is annexed to the claimant's petition, was duly entered into by the parties, as therein set forth.

2. In May, 1874, the claimant began to deliver rubble-stone, and had delivered fifty cubic yards of such as came within the description and standard of the smaller-sized stone required by the contract, when Mr. D. B. Thomas, the assistant superintendent of the work, in immediate charge thereof for the defendants, rejected these stone, refused to receive any of the same description, and informed the claimant of the kind which must be furnished to make such a wall as he wanted, and which was, in fact, a ranged-rubble

or broken-ashlar stone of a more expensive kind than that called for by the contract, and which would make a wall superior in appearance to that contemplated by the specifications. At this time the claimant had quarried and ready for transportation and delivery 230 cubic yards more of rubble-stone, the quarrying
16 of which was worth $805.

3. The claimant, while maintaining that he thought the stone he had delivered was up to the contract, expressed a willingness and desire to furnish such material as would give perfect satisfaction to the government and its agents. Thereupon he got out, and at different times, almost weekly, between June 1 and November, 1874, delivered in all 958¾ cubic yards of ranged-rubble or broken-ashlar stone, different from that called for by the contract, and worth $12.50 per cubic yard as delivered. These stone were cut, trimmed, and squared by defendants' workmen, so as to fit them for such a wall as said Thomas desired to make, and thereby lost one-fourth part in measurement, and in the wall measured only 767 cubic yards.

4. From time to time said claimant, in the presence of said assistant superintendent and of the superintendent, asserted that he was required to furnish a superior stone to that required by the contract. In August, 1874, one Mr. Oakshot was sent by the supervising architect of the Treasury Department to examine the work and put the superintendents right on it. The claim-
17 ant then, in presence of said Oakshot, and of the superintendent and assistant superintendent, protested that he was required to furnish stone superior to that required by the contract, and announced his intention to make claim for extra allowance. Mr. Oakshot compared the work done with the plans and specifications, pronounced it superior to that contemplated, being, he said, in fact, ranged-rubble or broken-ashlar walls, but suggested that it would perhaps be necessary then to complete the work as begun. Subsequently Mr. Oakshot officially visited the work several times, once in company with the supervising architect, and always referred to the foundation-walls as being of a superior class of work, to which fact he called the attention of the supervising architect, and to which that officer assented.

5. The market value of the 50 yards of rubble-stone rejected, and of the 230 yards quarried and not received by the defendants, as set forth in the second finding, was $456.80.

6. Four payments were made to the claimants, amount-
18 ing in all to $3,825, upon vouchers made out upon estimates, generally in excess of the work actually done at the time, copies of which said vouchers, with the certificate of the superintendent thereto, and the receipts of the claimant, are as follows: "The stone was designated therein by the superintendent as 'rubble-stone' because he had no room for any other designation under the specifications."

The United States to Philemon B. Hawkins, DR.

On acccount of the appropriation for construction of the U. S. c. h. and post-office at Raleigh, N. C.

Date.	Designation.	Application.	Amount.
1874.			Dolls. Cts.
June 3.	To three hundred (300) cubic yard rubble-stone, @ $5 per cubic yard.	Construction of the U. S. court-house and post-office at Raleigh, N. C.	1,500 00
		Less 10 per cent.....	150 00
			1,350 00

I certify that the articles above enumerated have been received and the services performed; that they were necessary for, and have been or will be applied to, the construction of the U. S. c. h. and p. office at Raleigh, N. C., and that the prices paid were just and reasonable. WM. H. HEARNE, *Superintendent.*

19 Received, Raleigh, this 4th day of June, 1874, from John C. Blake, disb'g agent, the sum of thirteen hundred and fifty dollars, in full payment of the above account. $1,350.

(Signed in duplicate.) PHILEMON B. HAWKINS.

Paid by check on Ral. Nat. Bank, No. 41, dated June 4, 1874.

The United States to Philemon B. Hawkins, DR.

On account of the appropriation for construction of the U. S. court-house and p. o., Raleigh, N. C.

Date.	Designation.	Application.	Amount.
1874.			Dolls. Cts.
July 1.	To two hundred cubic yds. of rubble-stone, @ $5 per cubic yard. Contract of 15 May, 1874.	Construction of U. S. court-house and p. o.	1,000 00
		Less 10 per ct. reserved.	100 00
			900 00

I certify that the articles above enumerated have been received and the services performed; that they were necessary for,
20 and have been or will be applied to, the construction of the U. S. p. office and ct. ho., Raleigh, N. C., and that the prices paid were just and reasonable.

WM. A. HEARNE, *Superintendent.*

IN THE

United States Supreme Court.

OCTOBER TERM, 1875.

WASHINGTON CITY, D. C.

HORATIO D. VANSYCKLE, } Plaintiff,
AGAINST
RAY COUNTY, } Defendant.

BRIEF of Wm. S. EVERETT,

With whom appears James L. Farris, Attorneys for Defendant.

IN THE

United States Supreme Court.

OCTOBER TERM, 1875.

WASHINGTON CITY, D. C.

HORATIO D. VANSYCKLE, } Plaintiff,
AGAINST
RAY COUNTY, } Defendant.

BRIEF of Wm. S. EVERETT,

With whom appears James L. Farris, Attorneys for Defendant.

No. 288. $100.

STATE OF MISSOURI,

RAY COUNTY BOND.

Issued in payment of the Stock of the } *St. Louis and St. Joseph Railroad Company.*

Ten Years.

Know all men by these presents, That the County of Ray, in the State of Missouri, acknowledges itself indebted and firmly bound to the St. Louis and St. Joseph Railroad Company in the sum of *One Hundred Dollars*, which sum the county promises to pay to the said St. Louis and St. Joseph Railroad Company, or bearer, at the American Exchange National Bank,

in the city of New York, in the State of New York, on the *first* day of January, A. D. 1879. Together with the interest thereon from the first day of January, A. D. 1869, at the rate of *eight* per cent. per annum, which interest shall be payable annually on the presentation and delivery at the said bank of the coupons of interest hereto attached. *This Bond* being issued under and pursuant to an order of the County Court of Ray County, made under the authority of the Constitution of the State of Missouri and the Laws of the General Assembly of the State of Missouri, and authorized by a vote of the people of said county at a special election held for that purpose.

In testimony whereof, the said county of Ray has executed this *Bond* by the presiding Justice of the County Court of said county under the order of said Court, signing his name hereto and by [L. S.] the Clerk of said Court under order thereof attesting the same and affixing thereto the seal of said Court. This done at the town of Richmond, county of Ray aforesaid, this second day of November, 1869.

C. W. NARRAMORE,

Presiding Justice of the County Court of Ray County, Missouri.

Attest: GEO. N. MCGEE, *Clerk of the County Court of Ray County, Missouri.*

$8.00 COUPON.

RICHMOND, RAY COUNTY, MISSOURI, November 2d, A. D. 1869.

The county of Ray acknowledges to owe the sum of *Eight Dollars*, payable to bearer on the first day of January, A. D. 1871, at the *American Exchange National Bank* in New York, for one year's interest on *Bond* No. 288.

GEO. N. MCGEE,

Clerk of County Court of Ray County, Mo.

HISTORY OF THE CASE.

This is an action of *assumpsit* brought for the recovery of interest claimed to be due, by divers interst coupons attached to bonds issued by the County Court of Ray County, Missouri, in payment of subscription to the capital stock of the St. Louis and St. Joseph Railroad Company. As a defense, the County interposed a plea that the General Assembly of the State of Missouri, by act approved December 5, 1859, Sessions Acts of 1859–60, page 414 *et seq.*, incorporated the Missouri River Valley Railroad Company. By the 20th section of that act the County Court of any county in which any part of the route of the road might be, was authorized to subscribe to the stock of the company, and invest its funds in the stock of the company, and to raise such funds by tax, to be voted by the legal voters of such county in such manner as such County Court might prescribe, for the purpose of paying such stock; but it did not authorize the issuing of any bonds for such purpose.

But by the third section of a supplemental or amendatory act, approved March 30, 1860, the County Courts respectively of the counties of Randolph, Chariton, Carroll, Ray, Clay and Platte were authorized to issue bonds of their respective counties where they shall have subscribed to or become purchasers and owners of capital stock of the Missouri River Valley Railroad Company, which bonds were to be issued in sums not exceeding one thousand dollars each, having not

exceeding ten years to run to maturity, bearing interest at the rate of eight per cent. per annum, payable annually, *at the county seat of such county, or in the city of St. Louis, as the County Court might prefer.* The bonds thus provided for when so issued and delivered to the company were to be in payment of the stock so subscribed or purchased. See Sessions Acts of called session of 1860, pages 15 and 16, in Sessions Acts of 1859 and 1860.

On the second day of July, 1860, the County Court of Ray County, Missouri, ordered an election by the citizens to be held on the 13th day of August, 1860, at the several places of voting, to determine whether the county of Ray should subscribe or take two hundred thousand dollars of stock in the Missouri River Valley Railroad Company, upon conditions:

First. That all of said county stock should be expended on that part of the railroad in the county of Ray. That said subscription should be payable in county bonds to run ten years, bearing interest at the rate of eight per cent., the interest to be paid annually; and

Second. That no bond should be issued or delivered to the company until provisions should be made for building the said road to the eastern boundary of the county of Ray.

The said election was held on the 13th day of August, 1860, and when the votes came to be canvassed on the 8th day of November, 1860, it appeared that there had been a large majority of the said votes cast in favor of the making of the subscription upon the conditions before mentioned. The said Court thereupon appointed agents to make the subscription and vote the stock so subscribed for and on behalf of the county. This subscription was made, but no bonds were ever issued to the Missouri River Valley Railroad Company.

By the 12th section of an act of the General Assembly of the State of Missouri, approved February 10, 1864, Sessions

Acts adjourned session 1864, page 50 *et seq.*, the Missouri River Valley Railroad Company, by the name of the Missouri Valley Railroad Company, was authorized, by a vote of a majority of their stockholders in interest, to transfer and assign to the North Missouri Railroad Company all of their effects and assets, rights and privileges, under their charter, and all the work that had been done in the construction of their road; and upon such transfer being accepted by the North Missouri Railroad Company, the said Missouri Valley Railroad Company should cease to have a corporate existence, and a new company was in that case to come into existence to be styled and known as the West Branch of the North Missouri Railroad.

On the 4th day of April, 1864, the County Court of Ray County made an appointment of agents to vote for directors of the Missouri River Valley Railroad Company, and at the same time ordered and directed the agents so appointed to vote in the meeting of stockholders of the said Missouri River Valley Railroad in favor of transferring and assigning all of the effects and assets, rights and privileges belonging to the Missouri River Valley Railroad Company under its charter to the North Missouri Railroad Company, under the provisions of the 3d section of the act of February 10, 1864, before referred to.

On the 16th day of July, 1864, the said agents made report to the said County Court (amongst other things), that they had cast the vote of Ray County in favor of the transfer and assignment of the effects, assets, &c., of the Missouri River Valley Railroad Company to the North Missouri Railroad Company, which report was approved by the said court and ordered to be filed and recorded.

On the 18th day of December, 1866, the County Court of Ray County, without any vote of the people or any step being taken to procure or obtain such vote, entered into an agreement in writing, by which the said North Missouri Railroad

Company agreed (amongst other things) to build, run and operate the West Branch of the North Missouri Railroad to the city of Richmond, in Ray County, by a spur of said West Branch, &c.

In consideration of which the County Court of said County of Ray agreed to take one hundred and fifty thousand dollars of the stock of said company, and to issue the bonds of said county to the said company for that amount.

On the said 18th day of December, 1866, the said county court made an order for the issue of the said one hundred and fifty thousand dollars in county bonds in favor of the said North Missouri Railroad Company, but no such bonds were ever issued.

On the 31st day of December, 1867, the St. Louis and St. Joseph Railroad Company was incorporated under the General Incorporation Act, entitled, "Railroad Companies," being chapter 63 of the General Statutes of Missouri.

By the 17th section of this statute, as well as by section 14 of article 11 of the constitution of the State of Missouri, no county court could subscribe to the capital stock of any railroad company unless two-thirds of the qualified voters of such county should give their assent to such subscription at a general or special election.

By the 18th section of said General Statutes when any subscription was made by the County Court of any county in accordance with the provisions of the said 17th section, such County Court was authorized to issue bonds of the county or to levy a tax for the purpose of paying the installments of such subscription as might be called in from time to time by the board of directors of such railroad.

It is admitted by plaintiff, as appears of record, that the County Court of Ray County did not in fact, at any time, make any proposition or order by which the question was submitted to a vote of the citizens of Ray County to subscribe to

the capital stock of the St. Louis and St. Joseph Railroad Company, and that there was no election held at which the citizens of Ray County authorized the County Court to subscribe to the capital stock of the said railroad company, and issue bonds in payment of the same in any sum whatever.

And also that the charter of said company contained no provision by which the County Court was authorized to subscribe to the capital stock of said company without a vote of the people.

On the 19th day of May, 1868, the County Court of Ray County, without the consent of two-thirds, or any other number, of the qualified voters of the said county, and without any election, general or special, for that purpose had or held, entered into a pretended agreement or arrangement with the North Missouri Railroad Company by which the said railroad company released the said county of Ray from the subscription (or pretended subscription) made to that company, and the said County Court agreed to release that company from its undertaking to construct a spur or branch of its road to or through the town of Richmond.

The said County Court also undertook to subscribe two hundred thousand dollars to the stock of the St. Louis and St. Joseph Railroad Company, and to issue bonds of the county in payment of such subscription, but on terms entirely different from the terms of the subscription voted by the people of said county to the Missouri River Valley Railroad Company.

In pursuance of that agreement the County Court of Ray County, without the assent of two-thirds, or any other number, of the qualified voters of said county, given or expressed at a general or special election, or in any manner whatever, undertook to take stock in the St. Louis and St. Joseph Railroad Company by a pretended transfer to the latter company of the two hundred thousand dollars of stock which had been

attempted to be carried down by various transfers from the Missouri River Valley Railroad Company.

After this pretended transfer the said County Court, without the assent of the qualified voters of the said county as prescribed by law, issued bonds, including those involved in this suit, to the amount of two hundred thousand dollars, upon which interest was paid during a portion of the time and during the residue of the time payment was refused.

Having given this history of the various acts of the Legislature, and the action of the County Court, which have given rise to the present litigation, and the admissions of plaintiff, we proceed to state, and endeavor to prove the following propositions:

POINTS.

1st. That the County Court of Ray County had no authority to issue the bonds and coupons which are involved in this suit, and that having been issued without authority they are not the bonds or obligations of Ray County.

2d. The bonds contemplated and authorized by section 17 of chapter 63, of the General Statutes are, by section 18 of the same chapter, to be issued only to raise money to meet assessments on the subscription, when made, as such assessments are called in by the company, and bonds in payment of the entire amount of stock subscribed are wholly unauthorized.

3d. That the various acts of the General Assembly, the constitution of the State of Missouri, the records of the County Court, and the other facts and circumstances surrounding these transactions are sufficient to affect the plaintiff with notice of the invalidity of the bonds and coupons.

4th. That the defendant is not estopped or precluded from setting up the invalidity of the bonds, &c., by reason of the payment of interest upon such bonds.

1st. Then as to the question of the authority of the County Court to issue the bonds in controversy.

ARGUMENT AND AUTHORITIES.

A county is a municipal corporation, created for specific purposes, and like other corporations is clothed with such powers, and such only, as are necessary to effectuate the purposes of its creation.

We must start out with, and keep steadily in view, this proposition, namely: That all that a corporation is authorized by its charter, either in express terms or by necessary implication, to do, it may do; beyond that all its acts are illegal and void. Commonwealth vs Erie & North East R. R. Co., 3 Casey, 339. Dillon on Municipal Cor. 102.

A doubtful power in a corporation does not exist. To be doubtful is to be decisive against the power of the corporation. *Ibid.*

By the act of December 5, 1859, incorporating the Missouri River Valley Railroad Company, and the supplement thereto, approved March 30, 1860, the County Court of any county in which any part of the route of the road authorized to be constructed by said charter might be, was authorized to subscribe to the stock of that company, or to invest its funds in said stock and to raise the funds to pay such subscription or purchase by a tax, or the County Courts of Randolph, Chariton, Carroll, Ray, Clay and Platte counties, respectively, were anthorized to issue the bonds of such counties in payment of stock where *a previous subscription or purchase* had been made.

But before such subscription could be made, or tax levied, or bonds issued, such subscription and tax had "to be voted by the legal voters of such county, in such manner as such County Court may prescribe." It was further provided in the said supplemental act that the bonds to be issued thereunder were to bear interest at the rate of eight per cent. per annum, "payable annually *at the county seat of such county, or in the city of St. Louis,* as the County Court may prefer."

Under the provisions of the act of 1859, incorporating the Missouri River Valley Railroad Company, the County Court of Ray county, on the 2d day of July, 1860, made and entered of record an order for an election by the citizens, to be held in the several election districts of the county, on the 13th day of August, 1860, for the purpose of determining the question whether or not a subscription of two hundred thousand dollars should be made to the capital stock of that company. The order of the Court prescribed the terms and conditions upon which the said question was to be submitted to the vote of the citizens, and the subscription made, if made at all.

By the terms of this act of 1859, it will be seen that a simple majority of the qualified voters actually voting at any such election was sufficient to warrant the making of the subscription; and in this it differed entirely from the laws in force at the time the bonds now in controversy were issued, as we will see presently.

The election thus ordered was held, the votes were canvassed, by which it appeared that a majority of the votes cast were given in favor of the subscription; and the subscription was subsequently made to the capital stock of "The Missouri River Valley Railroad Company."

No bonds were ever issued, however, by the County Court of Ray County to the Missouri River Valley Railroad Company in payment of this stock, because the said company wholly failed to comply with the terms and conditions upon which that subscription was made.

In 1864 the Missouri River Valley Railroad Company and the County Court of Ray County undertook to transfer the stock which

had been regularly subscribed in that company to the North Missouri Railroad Company, under color of the provisions of an act of the General Assembly, approved the 10th of February, 1864, authorizing "The Missouri Valley Railroad Company," by a vote of its stockholders, to transfer its effects, etc., to the North Missouri Railroad Company. This attempt was made by the railroad company and the County Court without submitting the question to a vote of the citizens of the county, as appears by the records of the said Court, and was, therefore, as we say, without authority, and void. Indeed, if it were necessary to stop here to argue that question, it might well be regarded as more than doubtful whether the act of February 10, 1864, was applicable to the Missouri River Valley Railroad Company at all.

The company that was authorized by that act to transfer its assets, effects, etc., to the North Missouri Railroad Company, was "The Missouri Valley Railroad Company."

Now, there were two companies incorporated by the Legislature: "The Missouri Valley Railroad," incorporated in 1857, and "The Missouri River Valley Railroad Company," incorporated in 1859. The subscription authorized by the vote of the citizens, and made by the County Court of Ray County, was to the Missouri River Valley, while, as we have already seen, the company that was authorized by the act of February 10, 1864, to transfer its assets, effects, etc., was the Missouri Valley Railroad Company.

But whether the Missouri River Valley Company had authority under that act to make such transfer or not, is perhaps not of so much importance in this case, for the reason that even if it had such authority, and if the action of that company and the County Court were not a nullity, still such authority was fully exhausted when the transfer was made to the North Missouri Company, and there being no authority found either in the charter of the North Missouri Railroad Company or in any other legislative act for the transfer or consolidation of the stock, effects or assets of that company, or any part thereof, to or with any other, such transfer or consolidation could not be made.

Hence, when the North Missouri Railroad Company and the County Court of Ray County undertook to transfer the stock authorized by the vote of the citizens, and subscribed by the County Court of Ray County, in the Missouri River Valley Railroad Company, mediately or immediately to the St. Louis and St. Joseph Railroad Company, such attempt, whether we regard it as a transfer to, or a consolidation with, the latter company, was without authority, and therefore utterly void. At most, it can have no other or greater effect than a new subscription made, or attempted to be made by the County Court of Ray County to the capital stock of the St. Louis and St. Joseph Railroad Company.

But as a subscription to the stock of that company, it was void and of no effect whatever, because that at the time the St. Louis and St. Joseph Railroad Company was incorporated, as well as at the time the pretended transfer was made, the prohibition contained in the 14th section of the eleventh article of the Constitution of the State of Missouri, and the 17th section of chapter 63 of the General Statutes of Missouri "of railroad companies" was in full force.

By section 14 of article eleven of the Constitution of Missouri, it is provided as follows: "The General Assembly shall not authorize any county, city or town to become a stockholder in, or to loan its credit to, any company, association or corporation unless two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent thereto."

And by section 17 of chapter sixty-three of the General Statutes, it is provided as follows: "It shall be lawful for the county court of any county, the city council of any city, or the trustees of any incorporated town, to take stock for such county, city or town in, or loan the credit thereof to, any railroad company duly organized under this or any other law of the State: *Provided*, That two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent to such subscription."

Thus it will be seen that by the fundamental law of the State, as well as by the very statute under which the St. Louis and St.

Joseph Railroad Company has its being, no subscription to that company could be made by any county court until such subscription had been authorized by a vote of the citizens of the county; and that not merely by a majority of those voting, but by *two-thirds of the qualified voters of the county* voting in favor of it.

But there was no election held, general or special, at which the qualified voters of Ray County had an opportunity of making known their will upon the subject of a subscription to the stock of the St. Louis and St. Joseph Railroad Company.

True, an election was specially called and held in the summer of 1860, at which a majority of the citizens voting decided in favor of a subscription to the capital stock of the Missouri River Valley Railroad Company, which would have fully authorized the making of the subscription and the issuing of bonds in payment of it to that company. But that election was wholly void, for the purpose either of conferring authority upon the County Court to transfer the subscription made to the Missouri River Valley Company to the St. Louis and St. Joseph Company, or of making a new subscription to the latter company.

If the action of the County Court was intended as a transfer of the subscription from one company to the other, then it was without authority and void, as is determined by the Supreme Court of the United States in the case of Marsh vs. Fulton County, 10 Wallace, 676.

There, where in February, 1853, the Mississippi and Wabash Railroad Company was incorporated by the Legislature of Illinois, and authorized to construct a railroad from Warsaw, on the Mississippi River, to the east line of the State. In February, 1857, an act was passed by that Legislature amending the charter of the company, by which the line of the railroad was divided into three divisions, designated as the western, the central and the eastern, and each division was created a new company, so that there were three distinct corporations in place of the original corporation. *It was held* "that a subscription of stock and issue of county bonds, authorized upon a vote of the people of the county to the original corporation, could not be legally made to one of the three new corporations."

And this in a case where the line of road was the same, the objects to be attained were the same, and the companies were the same, except in name.

If, however, the action of the County Court was intended as a new subscription to the capital stock of the St. Louis and St. Joseph Railroad Company, then it was null and void, because there was no vote of the people of the county upon which to base it, and it therefore falls under the ban of the constitutional and statutory prohibition. The subscription being thus void, the bonds issued upon it were also void, because it requires a previous valid subscription to complete the contract and authorize the issue of the bonds.

This doctrine is asserted by different courts of the last resort in various cases. Thus, in the case of Aspinwall, et al. vs. Commissioners of the County of Daviess, 22 Howard, 378. In that case, Mr. Justice Nelson, in delivering the opinion of the court, says: "It is insisted that the contract of subscription became complete when, at the election, a majority of the votes was cast in its favor, and did not require the form of a subscription on the books for the stock of the railroad company to make it obligatory upon the parties; and which, if true, it is agreed the contract would be protected within the Constitution of the United States, as it would then have been complete before the constitutional prohibition of Indiana. But the Court is unable to concur in this view. It holds that a subscription was necessary to create a contract binding upon the county, on one side, to take the stock and pay in the bonds; and upon the other, to transfer the stock, and receive the bonds for the same. Until the subscription is made, the contract is unexecuted and obligatory upon neither party."

This doctrine is well settled by the Supreme Court of Missouri.

In Missouri, two classes of cases appear: In the one, the authority to subscribe for stock and issue bonds in payment of it was delegated in the various charters granted by the General Assembly to the different railroad companies prior to the adoption of the Constitution of 1865, and in the absence of a constituitonal prohibition, in which cases the bonds in the hands of innocent purchasers, for value without notice, have been held to be valid.

In the other, the constitutional prohibition obtains, and the general incorporation act having adopted it, all cases that have since been adjudicated the Supreme Court of Missouri has held, "that bonds issued without an election are void, for want of power to issue them, in whose hands soever they may be, and are not validated by the levy of taxes and the payment of interest thereon."

In Steins et al vs. Franklin County et al, 48 Mo., page 185, Judge Wagner, in referring to Flagg et al vs. The City of Palmyra, 33 Mo., 440, the Hannibal & St. Joseph Railroad Company vs. Marion County, 36 Mo., 294, and Barrett vs. Schuyler County, 44 Mo., 197, uses the following language:

"By an examination, it will be seen that every one of them, the qualified voters, had voted to confer the authority, and that some mere irregularities had existed as to the manner of giving the notices or casting up the vote. These irregularities could not be expected, nor were they necessary to be known to the purchasers. The only matter in which they were concerned was to know whether the power to issue the bonds existed. The taking and obtaining the majority vote in this case was the prerequisite—the *essential thing which gave the investiture of authority and conferred jurisdiction.* The Court possessed no power except what it derived from law, and that was only to imitate the proceedings by which the power might be called forth. The real authority came from the voters at the polls. If they sanctioned the measure and authorized the expenditure, the Court could then proceed and carry out their will; otherwise, not. Till the votes were taken and a majority of them were cast in favor of the proposition, the Court had no authority over the subject matter, *and their action was a total nullity.*"

In Steins et al vs. Franklin County, 48 Mo., 175, the contract was originally made and the County Court proceeded under the authority of the act of the Legislature concerning Roads and Highways, approved February 16th, 1865. In that case, it was admitted that the question was not submitted to the voters of Franklin county, and that no election was had for the purpose of

determining the matter. The County Court, as in the case at bar, proceeded of its own motion, without consulting the people, and entirely ignored this provision of law. The Court, in the opinion, page 187, says: "*As no* election was ever ordered, and no vote taken in this case, the Court had no jurisdiction whatever, and acted wholly without authority, and hence the bonds were void."

In The State of Missouri to use of Neal vs. Saline County Court, 48 Mo., Page 393, Judge Bliss, in delivering the opinion of the Court, uses the following language: "If the holder is to assume the vote from the mere issuing of the bonds, then the county would be prohibited from showing that there was no such vote, and county agents would be enabled to commit the grossest frauds by issuing them without any authority whatever; for *the real authority comes from the people, and the Statute only enables the people to bestow it.*"

The same doctrine is held in St. Joseph & Denver City Railroad Company vs. Buchanan County, 39 Mo., 489. In Carpenter vs. The Inhabitants of the Town of Lathrop, 51 Mo, 483, an election was held, but no returns had been made by the judges of the election to the Board of Trustees of the town. There was no record of the action of the Board in determining the result of the election, and as this duty devolved upon the Board of Trustees, and not having determined in an official way whether the requisite majority of the qualified votes were cast in favor of the subscription, the Court held the bonds void for want of power to issue them.

Under the Constitution and statute of Missouri, then, two things must concur before the County Court had any power to issue the bonds in controversy. First, a subscription must have been authorized by a vote of two-thirds of the qualified voters of the county to the capital stock of the St. Louis and St. Joseph Railroad Company, and, second, a subscription must have been actually made by the County Court to the capital stock of said company, based upon that vote.

If either or both of these requisites be wanting, the issuing of the bonds was totally void for want of authority in the County

Court. The same doctrine is held by the Supreme Court of California, 25 Cal. Rep., 635: by the Supreme Court of Pennsylvania, 29 Penn., 186; by the Court of Appeals of New York, Gould vs. Sterling, 24 N. Y., 464; Starin vs. Genoa, 23 N. Y., 452; People vs. Mead, 36 N. Y., 224; by the Supreme Court of Ohio, Treadwell vs. Commissioners, 11 Ohio, St. 183; by the Supreme Court of Illinois, Schuyler County vs. The People, 25 Ill., 181; Supervisors of Hancock County vs. Clark, 27 Ill., 305; Marshall County vs. Cook, 38 Ill., 45; by the Supreme Court of Alabama, in 22 Alabama Rep., 760; and The United States vs. City Bank of Columbus, 21 How., 356, illustrates clearly the principle that a corporate officer cannot bind the corporation by his unauthorized acts or representations concerning the authority of himself or others. Then, if the bonds in controversy were issued without authority, they are invalid in the hands of the plaintiff, even though he be an innocent purchaser.

This is ruled in the case of Marsh vs. Fulton County, 10 Wallace, 676, before cited.

It is there decided that "the authority to contract must exist before any protection as innocent purchaser can be claimed by the holder."

A careful examination of this case will show that in very many of its features it is on all fours with the case at bar.

The same general doctrine is held by the Supreme Court in the Floyd acceptances, 7 Wallace, 666.

So also in the case of the Mayor vs. Ray, 19 Wallace, 478. In this case Mr. Justice Bradley holds this language: "Where the power is clearly given," (to issue the securities) "and the securities have been issued in conformity therewith, they will stand on the same basis and be entitled to the same privileges as public securities and commercial paper generally, but where the power has not been given, parties must take municipal orders, drafts, certificates, and other documents of the sort, at their peril. Custom and usage may have so far assimilated them to regular commercial paper as to make them negotiable—that is, transferable by delivery or indorsement. This quality renders them more con-

venient for the purposes of the holder, and has, undoubtedly, led to the idea—so frequently, but, as we think, erroneously entertained—that they are invested with that other characteristic of commercial paper—freedom from all legal and equitable defenses in the hands of a *bona fide* holder. But every holder of a city order or certificate knows that to be valid and genuine at all, it must have been issued as a voucher for city indebtedness. It could not be lawfully issued for any other purpose. He must take it, therefore, subject to the risk that it has been lawfully and properly issued. His claim to be a *bona fide* holder will always be subject to this qualification. * * * The officers of the city have no authority to issue it for any illegal or improper purpose, and their acts cannot create an estoppel against the city itself, its tax-payers, or people. * * * Of course they" (the holders) "are effected by the absence of these essential ingredients; and all subsequent holders take *cum onere*, and are affected by the same defect."

We have cited from this opinion thus extensively because, whether it be considered as an authority or an argument, it is, in our judgment, alike decisive of the principle now under consideration.

It is true the securities, the validity of which were involved in The Mayor vs. Ray, were not municipal bonds, like those involved in the present case; but that, in our judgment, only makes that case stronger in our favor, for the reason that those securities belonged to a class which the city had a general power to issue; whereas, the bonds involved in this case are such as the County Court had no authority whatever to issue, except under special, positive enactments, and then only in the mode and under the restrictions imposed by law.

An essential part of that mode was by a vote of two-thirds of the qualified voters of the county to be cast in favor of the subscription at a general election, or at an election held specially for that purpose. Without such a vote the Constitution of the State of Missouri absolutely prohibits any subscription to this or any other railroad company.

The provision of the General Statute under which the St. Louis and St. Joseph Railroad Company was incorporated, and under which the bonds in controversy must be sustained, if sustained at all, is in entire conformity with the constitutional provision. The bonds in controversy could be made valid only by a substantial compliance with the law that authorized their issue. This point is fully decided in the case of the State, ex. rel. Lexington and St. Louis Railroad Company vs. Saline County, 45 Mo., 247.

In that case a vote of the people had been taken, the only want of conformity with the law being that neither in the order for the election nor in the vote cast was there any definite amount named as the amount to be subscribed.

The same principle is held in the State of Missouri to use of Neal vs. Saline County Court, 48 Mo., 392. But in this case it is said by the Judge who delivered the opinion of the Court that "when the law imposes such a condition upon the exercise of the power as a submission to a vote of the people, and an attempt has been made in good faith to comply with the condition, and it has been supposed by all parties to have been regularly complied with, the bond upon its face showing a compliance, strangers should not be required to look further."

But in the case of Steins et al vs. Franklin County et al, 48 Mo., 187, it was ruled that "as no election was ever ordered, and no vote taken in the case, the Court had no jurisdiction whatever, and acted wholly without authority, and hence the bonds were void."

So in the present case. No election was ever ordered, nor was any vote ever taken, and the Court had no jurisdiction either to make a subscription or to issue the bonds, and therefore the bonds issued were and are absolutely void.

And being absolutely void, the holder cannot claim for them the protection thrown around commercial paper generally, even though he had been an innocent purchaser, as we have already seen.

Let it be remembered that all these cases decided by the Court of the last resort of the State of Missouri are since the adoption of the constitutional prohibition.

It is said that an innocent purchaser is not bound to look beyond the face of the bond which recites that "these bonds being issued under and pursuant to an order of the County Court of Ray County, made under the authority of the Constitution of the State of Missouri, and the laws of the General Assembly of the State of Missouri, and authorized by a vote of the people of said county, at a special election held for that purpose."

To this we answer that such a recital cannot prevail against the records of the County Court which show that no election of the citizens, general or special, was ever held for the purpose of determining whether any subscription should be made to the capital stock of the St. Louis and St. Joseph Railroad Company; and especially so where the recital in the bond does not state that such vote was such as is required by the Constitution and Statute of the "State of Missouri."

In considering our second proposition, viz: That the bonds contemplated and authorized by section 17 of chapter 63, of the General Statutes, are, by section 18 of the same chapter, to be issued only to raise money to meet assessments on the subscription, when made, as such assessments are called in by the company, and bonds in payment of the entire amount of stock subscribed are wholly unauthorized. In Barton County vs. Walser, 47 Mo., page 201, it is held, "It is nowhere held that the county court is the general agent or representative of the county. It is a part of the State government, with specific powers, duties and functions. * * * Duties imposed upon the county court by the Legislature, it performs as acts of obedience to the Legislature directly as a State functionary, and not as an agent of the county. It is true, it can bind the county in some contracts, subject it to some legal obligations, and appropriate its money to certain objects, but these powers it exercises by virtue of authority derived from the State government and in obedience to State laws." The fact must be kept in view, that the Constitution of Missouri and the Statute

under which county courts derive their authority to act, absolutely prohibit said courts from making subscription and issuing bonds unless the terms of the Statute are complied with, and when the provisions of the law are complied with, the circumstances under which any bonds may issue, and the kind of bonds that may issue, are clearly defined.

The right to subscribe for stock in the company is dependent upon a vote of two-thirds of the qualified voters of the county favoring the proposition. The subscription having been made the county becomes a member of the corporation as a stockholder, and upon an exact equality of all other stockholders, and under the same liability, and no other, of the stockholders to pay the calls as made on the stock. For this purpose power has been conferred by law upon the county court to meet the calls upon the stock as made by a direct tax on the county. Section 18, chapter 63, General Statutes, or section 18, page 305, Wagner's Statutes, provides:

"Upon the making of such subscription by any county court, as provided for in the previous section, such county shall thereupon become like other stockholders to such stock, entitled to the privileges granted, and subject to the liabilities imposed by this chapter, or by the charter of the company in which such subscription shall be made; and in order to raise funds to pay the installments which may be called for from time to time by the board of directors of such railroad, it shall be the duty of the county court making such subscription to issue bonds, or levy a special tax upon all property made taxable by law for county purposes * * * * to pay such installments, to be kept apart from other funds, and appropriated to no other purpose than the payment of such subscription; but the total amount of tax levied for railroad purposes in any one year, in any county, shall not exceed thirty per centum of the subscription made by such county."

It is clear from the above provision of law that the county court must either raise the necessary funds by a direct tax, or by issuing the bonds of the county and selling them in the market and placing the proceeds in the county treasury as a special fund with which to pay the calls as made by the company. As appears from the agreed statement of facts in this case, no calls on the stock were ever made—no bonds were ever issued to raise a fund

to pay the calls—but the Court, without authority, issued bonds to the nominal amount of the par value of the stock subscribed for in the name of the county, and delivered them to the company in payment of such subscription.

The bonds upon their face are made payable to the Railroad Company, when by the law the County Court had no authority to issue such bonds to the Railroad Company, and the Railroad Company, by its charter, had no authority, express or implied, to take such bonds or to become the payee thereof in its own right or as trustee. Hence, it follows that the bonds are void for want of authority, and every holder of them took them with express notice of such want of authority in the county to issue them, and of the want of authority in the Railroad Company to take them as payee.

The statute before referred to, is that under which the County Court derives its power to act in cases of this sort; and it is the same law under which the St. Louis and St. Joseph Railroad Company derived its charter.

And this brings us to the consideration of our third proposition, namely:

That the various acts of the General Assembly, the Constitution of the State of Missouri, the records of the County Court, and the other facts and circumstances surrounding these transactions, are sufficient to affect the plaintiff with notice of the invalidity of the bonds and coupons.

We do not regard the establishment of this proposition as being essential to our defense, because if the bonds were void for want of jurisdiction in the County Court to issue them, notice to the plaintiff, or the want of it, is of no consequence. If, however, the issuing of the bonds should be held to be not void but irregular only, then the question of notice becomes important. Upon this question of notice, then, we will start out with this proposition, namely:

That "Whatever puts a party on inquiring amounts to notice, provided the inquiry becomes a duty, as in case of purchasers and creditors, and would lead to the knowledge of the requisite fact by the exercise of ordinary intelligence and understanding." Jaques

vs. Weeks, 7 Watts, 267. Hood vs. Fahnestock, 1 Pa., State Rep., 470.

And in Epley vs. Witherow, 7 Watts, 167, the rule is stated thus: "It is well settled that whatever is sufficient to put a purchaser upon inquiry, which would necessarily have led him to a discovery or knowledge of the adverse claim or interest, is sufficient to affect him with notice thereof."

Again: "Notice sufficient to put one upon inquiry as to the existence of a right or title is, in law, presumed to be notice of such right or title. But such presumption may be repelled by proof that he failed to discover such right, notwithstanding the exercise of due diligence." Rhodes vs. Outcolt, 48 Mo., 367.

So "a party, put by circumstances on inquiry as to a fact, is affected with constructive notice thereof." Oliver vs. Piatt, 3 Howard, 333; Jenkins vs. Eldridge, 3 Story, 182; Carr vs. Hinton, 1 Curtis, 390; United States vs. Sturgis, 1 Paine, 525, and Hinde vs. Oattier, 7 Peters, 252.

The pendency of proceedings in bankruptcy is constructive notice to all granters of property proceeding from the bankrupt. Morse vs. Godfrey, 3 Story, 365.

So "where a sale of a decedent's property is made without authority, the purchaser is presumed to have notice of it; it is his duty to inquire whether or not the requisitions of law were complied with." Patterson vs. Gaines, 6 Howard, 551.

Then to apply these authorities to the case and question in hand.

The County Courts of the several counties of the State of Missouri are courts of record. Each of these courts has, by general enactment—of which all the world is bound to take notice—a clerk to record all its proceedings, and a seal to verify and authenticate them. These proceedings of the County Courts, when once duly entered, are as fully, to all intents and purposes, public records, as are the records of the proceedings of the highest tribunal in the land. They are as much public records as are the records of the proceedings of any of the departments of the government, state or national.

These records, when made up, constitute the evidence, and the only evidence, of the acts and proceedings of these courts, unless indeed it be in cases where the records have been lost or destroyed.

Being, then, public records, they are constructive notice to all men of the acts, doings and proceedings of these courts.

When, therefore, the County Court of Ray County was clothed by the Constitution and act of the General Assembly of the State of Missouri with a special jurisdiction with reference to making subscriptions to the stock of railroad companies and issuing bonds in payment of such subscription, and the mode and manner in which that jurisdiction shall be exercised, are specifically prescribed; the records of the Court furnish the proper evidence as to whether such jurisdiction has been exercised in the mode prescribed.

In this case an essential pre-requisite to the making of any subscription to the stock of the St. Louis and St. Joseph Railroad Company, or the issuing of bonds, was the assent thereto of two-thirds of the qualified voters of the county, given at a general or special election.

Such an election could be ordered only by the County Court; and the order for such an election, if ever made, together with the result of that election, would necessarily be entered on the records of the Court and become a part of them.

Here, then, was a source to which the plaintiff and all others could look, and from which they could with certainty ascertain whether the coustitutional and statutory pre-requisites to the conferring of any authority upon the County Court to make any subscription or issue bonds, had been complied with.

To these records the plaintiff was bound to look, for they not only lay in the channel of his title to the bonds, and his right to recover upon them, but they were they which infused vitality into the bonds, if they ever had any vitality.

The County Court was but the agent of the county, and as such agent, its powers were very limited and very well defined by the Constitution and Statute. The County Court had no general

power to subscribe to the stock of this company, or to issue bonds in payment of such subscription.

This fact, taken in connection with the constitutional prohibition, was sufficient to put the plaintiff upon inquiry, which, if made and pursued in the proper channel, namely, through the records of the County Court, it would necessarily have led him to a discovery or knowledge of the total invalidity of the bonds.

It was as much the duty of the plaintiff to inquire whether or not the requisitions of law had been complied with prior to the issue of the bonds in controversy, as it was the duty of the purchaser to make a similar inquiry in the case of Patterson vs. Gaines, 6 Howard, 557.

But it is said that the bonds contained a recital that they were issued under and pursuant to an order of the County Court of Ray County, made under the authority of the Constitution of the State of Missouri, and the laws of the General Assembly of the State of Missouri, and authorized by a vote of the people of said county, at a special election held for that purpose, and that the plaintiff was not bound to look beyond that recital.

To this there are several answers, either one of which, we think, is conclusive.

First. It will be found, upon an examination of the cases where this view has been taken by the courts, that they were all cases in which there had been an attempt or effort made to comply with the pre-requisites of the statutes authorizing the subscriptions, and whatever defects there were in the execution of the powers, were held to be mere irregularities.

Second. The recitals in the bonds involved in this case are wholly insufficient to produce the effect contended for.

They do not recite the purpose for which they were issued. This was held to be necessary by Mr. Justice Miller in the case of Thayer vs. Montgomery County, Central Law Journal, vol. 1, 365. It does not appear in the recitals that the bonds were issued to aid in the construction of the St. Louis and St. Joseph Railroad, or for any other purpose authorized by law.

Neither do the bonds recite that there had been any subscription made to the stock of that company, or that the bonds were issued in payment for stock.

Nor yet does it appear in the recitals that the County Court was authorized to make any subscription or issue these bonds by the assent of two-thirds of the qualified voters of the county. Nor indeed was any vote of any kind ordered by the County Court; no vote of any kind was taken, and no subscription was made to the stock of the company; all of which would have fully appeared to the plaintiff if he had not, regardless of his duty in the premises, wholly neglected to make the inquiry that was plainly open to him, and which, if it had been made, would have inevitably led him to a knowledge of the want of authority in the County Court to issue the bonds.

It is idle to talk of the hardship of requiring purchasers of municipal bonds to examine the public records to ascertain whether or not the requirements of law have been so far complied with as to clothe the County Court with power to issue them.

It would be a much greater hardship to permit the County Courts, not only without authority, but in total disregard of a constitutional prohibition, to issue county bonds to any amount such court may see proper, thereby, in many cases, bankrupting the counties.

The present plaintiff in the purchase of the bonds involved in this suit was a mere volunteer. He purchased upon speculation. He cannot, therefore, claim that the rules which ordinarily govern in questions of constructive notice should be relaxed in his favor.

The bonds in controversy in this case, taken in connection with the act of the General Assembly under which the only vote ever cast by the citizens of Ray County upon the question of the making of any subscription and issue of county bonds was given, contain sufficient upon their face to put the purchaser upon inquiry at least, as to the authority of the County Court to issue them.

The statutes under which that vote was taken, and the vote cast, authorized a subscription to be made to a different road, for

a specific purpose, upon specific conditions, and the bonds to be issued payable only in the city of Richmond or the city of Saint Louis, as the County Court might determine. The bonds in controversy were made payable at the American Exchange Bank, in the city of New York.

Here was such a variance as ought to have put the plaintiff upon inquiry; if he had exercised the same degree of care and diligence in examining the public records that he or any other man of ordinary care and prudence would have exercised if purchasing a piece of ground twenty feet feet square in the town of Richmond, that examination must inevitably have led him to the knowledge of the want of authority in the County Court to issue the bonds.

Having totally failed in the exercise of that care and prudence, he cannot visit the consequences of his own negligence upon the tax-payers of Ray County. It is high time that the courts should let it be known that the over-burdened tax-payers have still some rights which volunteer speculators are bound to respect.

We come, then, briefly to consider our third and last proposition, namely: That the defendant is not estopped or precluded from setting up the invalidity of the bonds and coupons by reason of the payment of a portion of the interest upon them.

If the defendant be estopped upon this ground, it can only be so for the reason that the payment of interest on the bonds was a ratification of them.

But if the bonds were void for want of authority in the County Court to issue them, they were incapable of ratification. A voidable act may be ratified, but a void act cannot. There are no degrees of comparison of the adjective "void."

You cannot say that one act is void, another more void, and a third most void.

If an act be void it is a mere nullity. If a contract be void it is incapable of ratification without such new and sufficient consideration as would support a new and independent contract. And herein consists the real distinction between acts or contracts that are void and such as are merely voidable, that the first are incapable of ratification, while the latter may be ratified.

Strong

Feb. 8. acq

6 Otto 676

Oct. 7. 1877

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 216.

THE COUNTY OF RAY, PLAINTIFF IN ERROR,

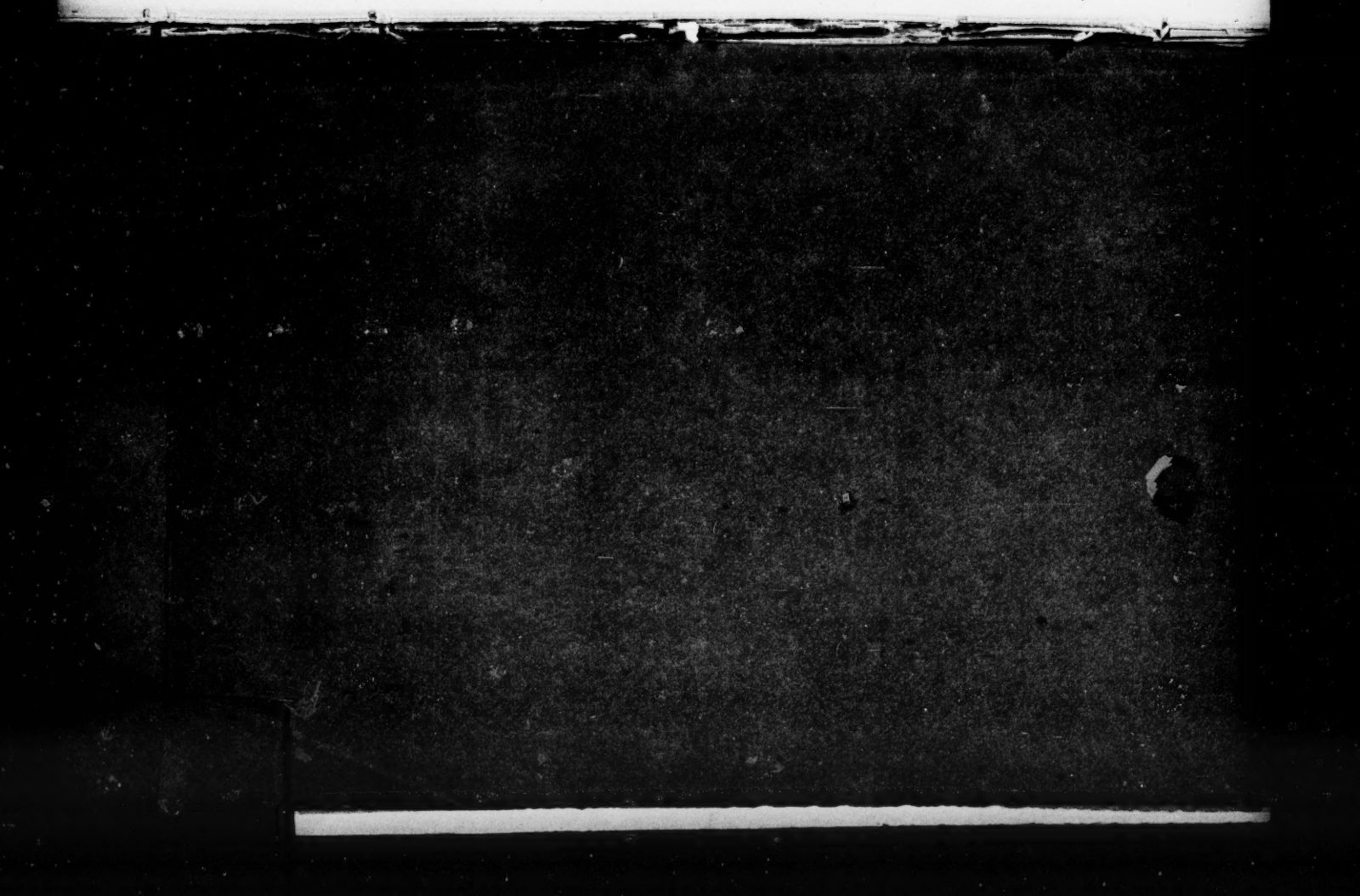
vs.

HORATIO D. VANSYCLE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

FILED [redacted], 1875.

Mayhew 3007



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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the western district of [SEAL.] Missouri, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at the April term, 1875, thereof, between Horatio D. Vansycle, plaintiff, and the County of Ray, in the State of Missouri, a manifest error hath happened, to the great damage of the said county of Ray, as by its complaint appears:

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this first day of May, in the year of our Lord one thousand eight hundred and seventy-five.

Issued at office in the city of Jefferson, with the seal of the circuit court of the United States for the western district of Missouri, dated as aforesaid.

H. C. GEISBERG,
Clerk C. C. U. S. Western Dist. Mo.

Allowed by—

A. KREKEL, *Judge.*

2 UNITED STATES OF AMERICA,
Western District of Missouri, sct:

I' obedience to the command of the within writ of error, I herewith transmit to the Supreme Court of the United States a transcript of the record and proceedings in the within-mentioned case, together with all things concerning the same.

In witness whereof I hereunto subscribe my name this 30th day of July, A. D. 1875.

H. C. GEISBERG,
Clerk U. S. Circuit Court Western Dist. of Mo.

(Indorsed:) 245. United States circuit court western district of Missouri. Horatio Vansycle, D. E., vs. Ray County, in the State of Mo., P. E. Writ of error to the circuit court of the United States for the western district of Missouri. Returned and filed 187 . , clerk.

3 The United States of America to Horatio D. Vansycle, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, D. C., on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western district of Missouri, wherein the County of Ray, in the State of Mis-

souri, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Arnold Krekel, judge of the circuit court of the United States for the western district of Missouri, this first day of May, in the year of our Lord one thousand eight hundred and seventy-five.

A. KREKEL,
Judge United States Circuit Court Western District of Missouri.

4 UNITED STATES OF AMERICA,
Western District of Missouri, ss:

We hereby acknowledge service of the within citation this 7th day of June, A. D. 1875.

PHILIPS & VEST,
Att'ys for Pl'ff.

(Indorsed:) 245. United States circuit court western district of Missouri. Horatio D. Vansycle, D. .... vs. County of Ray, in the State of Mo., P. E. Citation. Filed 1 87 . , clerk.

5 UNITED STATES OF AMERICA,
Western District of Missouri, set:

Pleas before the honorable circuit court of the United States in and for the western district of Missouri, at the April term thereof, A. D. 1875, in case of—

HORATIO D. VANSYCKEL
vs.
RAY COUNTY, IN THE STATE OF MISSOURI. } No. 245.

Be it remembered that heretofore, to wit, on the 17th day of March, A. D. 1874, there was filed in the clerk's office of the circuit court of the United States in and for the western district of Missouri a petition in the above-entitled case, in the words and figures following, to wit:

Petition.

UNITED STATES OF AMERICA,
Western District of Missouri:

In the circuit court of the United States for the western district of Missouri. April term, 1874.

HORATIO D. VANSYCKEL, PLAINTIFF,
vs.
RAY COUNTY, IN THE STATE OF MISSOURI, defendant.

6 1. The plaintiff, Horatio D. Vansyckel, who is a citizen of the State of New York, states that the defendant, Ray County, a municipal corporation created by and existing under the laws of the State of Missouri, and a citizen of the State of Missouri, heretofore, on or about the second day of November, A. D. 1868, by its certain

writing obligatory called bond, numbered 51, signed by C. W. Narramore, the presiding justice of the then county court of said county of Ray, attested by George N. McGee, then the clerk of said county court, sealed with the seal of said county court and bearing date the day and year last aforesaid, and herewith filed, acknowledged itself to be indebted and bound to the S't Louis and S't Joseph Railroad Company, or bearer, in the sum of one thousand dollars, which sum the said county promised to pay to the said S't Louis and S't Joseph Railroad Company, or bearer, at the American Exchange National Bank, in the city of New York, in the State of New York, on the first day of January, A. D. 1879, together with interest thereon from the first day of January, A. D. 1869, at the rate of eight per cent. per annum, which interest shall be payable annually on the presentation and delivery at the said bank of the coupons of interest attached to said bond; said bonds being issued under the constitution and laws of Missouri and to construct the S't Louis and S't Joseph Railroad. Plaintiff states that he is the bearer and holder of said bond, and also of the coupon for the annual install-
7 ment of interest, amounting to eighty dollars, due on the first day of January, A. D. 1874, which coupon was annexed to said last-named bond as aforesaid, and is now herewith filed; that although when said installment of interest became due, viz, on said first day of January, A. D. 1874, said last-named coupon was duly presented for payment at the said American Exchange National Bank, in the city of New York, and payment thereof was requested, yet the same was not nor has since been paid, but remains now due and wholly unpaid. Plaintiff states that upon payment of said coupon being refused, as hereinbefore set forth, the same was duly protested for non-payment, and plaintiff, having paid a valuable consideration for said bond and coupon, asks judgment for the sum of eighty dollars, with interest thereon from January the first, A. D. 1874, and four per cent. damages on said sum of eighty dollars, and his costs herein.

2. And plaintiff, for another and further cause of action, states that heretofore, on or about the second day of November, A. D. 1868, the said defendant, by its certain other writing obligatory, called bond numbered 80, signed by C. W. Narramore, the presiding justice of the then county court of said county of Ray, attested by the then clerk of said county court, sealed with the seal of said county court and bearing date the day and year last aforesaid, and herewith filed, acknowledged itself to be indebted and bound to the S't Louis and S't Joseph
8 Railroad Company in the sum of one thousand dollars, which sum the said county promised to pay to the said S't Louis and S't Joseph Railroad Company, or bearer, at the American Exchange National Bank, in the city of New York, in the State of New York, on the first day of January, A. D. 1879, together with interest thereon from the first day of January, A. D. 1869, at the rate of eight per cent. per annum, to be paid annually on the presentation and delivery at the said bank of the coupons of interest attached to said bond, said bond being issued under the constitution and laws of Missouri and to construct the S't Louis and S't Joseph Railroad. Plaintiff says that he is the bearer and holder of said bond, and also of the coupon for the annual installment of interest of eighty dollars, due on the first day of January, A. D. 1874, on said bond, which coupon was attached to said bond, and is also herewith filed; and plaintiff says that when said installment of interest became due, viz, on January the first, 1874, said last-named coupon was duly presented for payment at the said American Exchange National Bank, in the city of New York, and payment thereof was requested, but

the same was not paid, and is now wholly unpaid. Plaintiff states that upon payment of said coupon being refused the same was duly protested for non-payment, and that he is the purchaser and holder of said bond and coupon for a valuable consideration. Wherefore he asks judgment for the sum of eighty dollars, with interest from January
9 the first, A. D. 1874, and for four per cent. damages on said sum of eighty dollars, and for his costs.

3. And plaintiff, for another and further cause of action, states that heretofore, on or about the second day of November, A. D. 1868, the said defendant, by its certain other writing obligatory, called bond numbered 90, signed by C. W. Narramore, the presiding justice of the then county court of said county of Ray, attested by George N. McGee, the then clerk of said county court, sealed with the seal of said county court and bearing date the day and year last aforesaid, and herewith filed, acknowledged itself indebted and firmly bound to the S't Louis and S't Joseph Railroad Company in the sum of one thousand dollars, which sum the said county promised to pay to the said S't Louis and S't Joseph Railroad Company, or bearer, at the American Exchange National Bank, in the city of New York, in the State of New York, on the first day of January, A. D. 1879, together with interest thereon from the first day of January, A. D. 1869, at the rate of eight per cent. per annum, said interest payable annually on the presentation and delivery at the said bank of the coupons of interest hereto attached, said bond being issued under the constitution and laws of Missouri and to construct the S't Louis and S't Joseph Railroad. Plaintiff states that he is the bearer and holder of said bond and coupon, having purchased the same for a valuable consideration, said coupon being for the installment of interest amounting to eighty dollars, due on the
10 first day of January, A. D. 1874, which coupon was attached to said bond and is now herewith filed; and he says that when said installment of interest became due, viz, on January the first, A. D. 1874, said last-named coupon was duly presented for payment at said American Exchange National Bank, in the city of New York, and payment thereof was requested, which was refused, and said coupon is yet wholly unpaid. Plaintiff states that upon payment of said coupon being refused the same was duly protested for non-payment, and that he purchased said coupon for a valuable consideration. Wherefore he prays judgment for the sum of eighty dollars, with interest from January the first, A. D. 1874, and four per cent. damages on said sum of eighty dollars, and costs of suit.

4. And plaintiff, for another and further cause of action, states that heretofore, to wit, on or about the second day of November, A. D. 1868, the said defendant, by its certain other writing obligatory, called bond numbered 91, signed by C. W. Narramore, the presiding justice of the county court of said county of Ray, attested by the then clerk of said county court, sealed with the seal of said county court and bearing date the day and year last aforesaid, and herewith filed, acknowledged itself to be indebted and bound to the S't Louis and S't Joseph Railroad Company in the sum of one thousand dollars, which sum the said county prom-
11 ised to pay to the said S't Louis and S't Joseph Railroad Company, or bearer, at the American Exchange National Bank, in the city of New York and State of New York, on the first day of January, A. D. 1879, together with interest thereon from the first day of January, A. D. 1869, at the rate of eight per cent. per annum, said interest to be payable annually on the presentation and delivery at the said bank of the coupons of interest attached to said bond, said

bond being issued under the constitution and laws of Missouri and to construct the S't Louis and S't Joseph Railroad. Plaintiff says that he is the bearer and holder of said bond, and of the coupons for interest thereon, amounting to eighty dollars, due January the first, A. D. 1874, and which was attached to said bond and is herewith filed, having purchased said bond and coupon for a valuable consideration; that when said coupon became due, viz, on January the first, 1874, the same was duly presented for payment at said American Exchange National Bank, in the city of New York, and payment thereof requested, and payment refused, whereupon said coupon was duly protested for non-payment, and the same is yet wholly unpaid. Plaintiff asks judgment for said sum of eighty dollars, and interest thereon from January the first, A. D. 1874, and for four per cent. damages on said sum of eighty dollars and costs.

5. Plaintiff, for another and further cause of action, says that heretofore, on or about November the second, A. D. 1868, the said defend-
12 ant, by its certain other writing obligatory, called bond numbered 92, signed by C. W. Narramore, the presiding justice of the *the* county court of said county of Ray, attested by the then clerk of said county court, sealed with the seal of said county court and bearing date the day and year last aforesaid, and herewith filed, acknowledged itself indebted and firmly bound to the S't Louis and S't Joseph Railroad Company in the sum of one thousand dollars, which sum the said county promised to pay to the said S't Louis and S't Joseph Railroad Company, or bearer, at the American Exchange National Bank, in the city of New York and State of New York, on the first day of January, A. D. 1879, together with interest thereon from the first day of January, A. D. 1860, at the rate of eight per cent. per annum, payable annually on the presentation and delivery at the said bank of the coupons of interest attached to said bond, said bond being issued under the constitution and laws of Missouri and to construct the S't Louis and S't Joseph Railroad. Plaintiff says that he is the holder and bearer of said bond, and also of the coupon for the interest thereon, due January the first, A. D. 1874, for eighty dollars, and which coupon was attached to said bond and is herewith also filed, plaintiff having purchased said bond and coupon for a valuable consideration; and plaintiff says that when said coupon became due, viz, on January the first, A. D. 1874, the same was duly presented at said American Exchange National Bank,
13 in the city of New York, and payment thereof requested, which was refused, whereupon said coupon was duly protested for non-payment, and the same is now wholly unpaid. Wherefore plaintiff asks judgment for eighty dollars, with interest thereon from January the first, A. D. 1874, and for four per cent. damages on said sum of eighty dollars, and for costs.

Plaintiff, for another and further cause of action, says that heretofore, on or about November the second, A. D. 1868, the said defendant, by its certain other writing-obligatory, called bond numbered 93, signed by C. W. Narramore, the presiding justice of the then county court of Ray County aforesaid, attested by the then clerk of said county court, sealed with the seal of said county court, and bearing date the day and year last aforesaid, and herewith filed, acknowledged itself to be indebted and firmly bound to the S't Louis and S't Joseph Railroad Company in the sum of one thousand dollars, which sum the said county promised to pay to the S't Louis and S't Joseph Railroad Company, or bearer, at the American Exchange National Bank, in the city of New York, and State of New York, on the first day of January, A. D. 1879,

together with interest thereon from the first day of January, A. D. 1869, at the rate of eight per cent. per annum, payable annually on the presentation and delivery at the said bank of the coupons of interest attached to said bond, said bond being issued under the constitu-
14 tion and laws of Missouri, and to construct the S't Louis and S't Joseph Railroad. Plaintiff says that he is the bearer and holder of said bond, and also of the coupon for the interest due thereon on January the first, 1874, amounting to eighty dollars, which coupon was attached to said bond, and is now herewith filed; and plaintiff says that when said coupon became due, viz, on January the first, A. D. 1874, the same was presented for payment at said American Exchange National Bank, in the city of New York, and payment refused, whereupon said coupon was duly protested for non-payment, and is yet wholly unpaid. Wherefore plaintiff asks judgment for said sum of eighty dollars, with interest from January the first, 1874, and for four per cent. damages on said sum of eighty dollars, and for costs.

7. Plaintiff, for another and further cause of action, says that heretofore, on or about the second day of November, A. D. 1868, the said defendant, by its certain other writing-obligatory, called bond numbered 94, signed by C. W. Narramore, the presiding justice of the then county court of said Ray County, attested by the then clerk of said county court, sealed with the seal of said county court, and bearing date the day and year last aforesaid, and herewith filed, acknowledged itself indebted and firmly bound to the S't Louis and S't Joseph Railroad Company in the sum of one thousand dollars, which sum the said county of Ray promised to pay to the said S't Louis and S't Joseph Railroad
15 Company, or bearer, at the American Exchange National Bank, in the city of New York, and State of New York, on the first day of January, A. D. 1879, together with interest thereon from the first day of January, A. D. 1869, at the rate of eight per cent. per annum, payable annually, on the presentation and delivery at said bank of the coupons of interest attached to said bond, said bond being issued under the constitution and laws of Missouri, and to construct the S't Louis and S't Joseph Railroad. Plaintiff says that he is the bearer and holder of said bond, and also of the coupon of interest thereon for eighty dollars, due January the first, A. D. 1874, which coupon is herewith filed; and plaintiff says that on the day when said coupon became due, viz, on January the first, A. D. 1874, the same was presented for payment at said American Exchange National Bank, in the city of New York, and payment thereof was refused, whereupon said coupon was protested for non-payment, and the same is now wholly unpaid. Wherefore plaintiff asks judgment for said sum of eighty dollars, with interest from January the first, A. D. 1874, and for four per cent. damages, and costs of suit.

PHILIPS & VEST,
For Pl'ff.

And thereupon, on the said 17th day of March, A. D. 1874, a summons was issued out of the clerk's office of said court in words and figures following, to wit:

Summons.

WESTERN DISTRICT OF MISSOURI, *set:*

16 The President of the United States of America to the marshal of the western district of Missouri, greeting:

You are hereby commanded to summon Ray County, in the State of

Missouri, a citizen of said district, that he be and appear before the honorable circuit court of the United States for the western district of Missouri, on the first day of the next term thereof, to be holden at the city of Jefferson, in and for said district, on the 20th of April next, then and there to answer the complaint of Horatio D. Vansyckel, a citizen of the State of New York, as set forth in the petition filed in said court on the 17th day of March, A. D. eighteen hundred and seventy-four. Hereof fail not, and have you then and there this writ.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, the 17th day of March, A. D. eighteen hundred and seventy-four. Issued at office, in the city of Jefferson, under the seal of said circuit court, the day and year last aforesaid.

[SEAL.]

M. M. PRICE,
Clerk of said Court,
By C. M. WARD, *D. C.*

Upon the foregoing summons the marshal of the United States in and for the western district made the following return, to wit:

Marshal's return.

I hereby certify that I executed the within writ by delivering a true copy of same and a true copy of the declaration or bill of com-
17 plaint filed in the within-entitled cause to George N. McGee, clerk of the county court of the within named the county of Ray, on the 23d day of March, A. D. 1874, in Ray County, in the western district of Missouri.

GEORGE SMITH,
U. S. Marshal,
By W'M M. SMITH,
Deputy.

And afterwards, at a regular stated term of said circuit court of the United States in and for the western district of Missouri, begun and held at the city of Jefferson, in said district, on the third Monday of April, A. D. 1874, the following proceedings were had in this case on the 20th day of April in said year, to wit:

Order granting leave to plead.

HORATIO D. VANSYCKEL
vs.
RAY COUNTY. } No. 245.

Now comes the said parties, by their respective attorneys, and by consent leave is granted to defendant to file answer on or before August 1st, 1874, and copy to be served on plaintiff's attorneys by mail, and cause continued until next term of this court.

And afterwards, to wit, on the 25th day of June, A. D. 1874, it being in vacation of said court, there was filed in this case an answer in words and figures following, to wit:

Answer.

Circuit court of the United States for the eighth circuit and western district of Missouri, November term, 1874.

HORATIO D. VANSYCKEL, PLAINTIFF,
against
RAY COUNTY, DEFENDANT.

In answer to each and all of the causes of action in plaintiff's petition defendant denies that it ever made, issued, and delivered by its writing-obligatory certain bonds and coupons as is described and alleged in said petition, whereby it acknowledged itself to be indebted and bound to the S't Louis and S't Joseph Railroad Company, or bearer, in the sum of one thousand dollars each, or any other sum which the said county of Ray promised to pay to the S't Louis and S't Joseph Railroad Company, or bearer, at the American Exchange National Bank, in the city of New York, on the first day of January, A. D. 1879, at the rate of eight per cent. per annum.

Denies that by said alleged coupons the defendant promised to pay to the bearer on the first day of January, A. D. 1874, at the said Exchange National Bank, in the city of New York, the sum of eighty dollars each, or any other sum, as interest due on the date last aforesaid, on certain bonds issued by the defendant, or any bonds mentioned in said alleged coupons.

Whether or not the plaintiff is now, or was at the time of filing his petition, or at any other time, the owner or holder or bearer of said alleged bonds and coupons the defendant, and its officers, agents, and attorneys, have no knowledge or information sufficient to form
19 a belief, and therefore defendant demands proof of the allegation that the plaintiff is the owner, holder, and bearer of said alleged bonds and coupons.

Whether or not on the first day of January, A. D. 1874, or at any other time, the said alleged coupon was duly presented for payment at the Exchange National Bank in the city of New York, and payment thereof was refused, the defendant, and its officers, agents, and attorneys, have no knowledge or information sufficient to form a belief; and therefore defendant demands proof of the allegation that the said alleged coupons were duly presented for payment on the said first day of January, A. D. 1874, at the bank aforesaid, and payment thereof refused.

Defendant denies that the amount of said alleged coupons or any of them, or any part thereof, remain due from the defendant to the plaintiff.

Defendant denies that said bonds and coupons have come to and are the property of the plaintiff, or that he has been or is now the true and lawful holder or bearer thereof, for value, without notice.

Denies that C. W. Narramore, the then presiding justice of the county court of Ray County, and George N. McGee, the clerk, as officers or agents of this defendant, had power, either in the charter of the S't Louis and S't Joseph Railroad Company, or by the assent of the qualified voters of said Ray County, to subscribe to the capital stock of said railroad company, and issue bonds in payment thereof;
20 but states the facts to be, that if such bonds were made, issued, and delivered as in plaintiff's petition is alleged, were wholly unauthorized by this defendant, and made without its knowledge or consent; of all which facts the plaintiff had full notice.

Defendant, further answering, states that the S't Louis and S't Joseph Railroad Company was incorporated under the general incorporation

act entitled "Railroad Companies," chapter 63 of the General Statutes of Missouri; that the corporators named in the chapter organized under the same on the 31st day of December, A. D. 1867; that by the provisions of the charter so obtained the company was authorized to construct a road from the West Branch of the North Missouri Railroad, at Richmond, in Ray County, through Plattsburgh, to S't Joseph, Missouri, and that the general statute under which it received its charter did not authorize any county through which said railroad may be located to subscribe to the stock of said railroad company, and issue bonds of such county to raise funds to pay the same, unless two-thirds of the qualified voters of such county first give their assent thereto. And this defendant denies that there was any election held in and by said county of Ray at any time in reference to making any subscription to the stock or loaning the credit thereof to the said railroad company.

Defendant, further answering, states that the S't Louis and S't
21 Joseph Railroad Company had no power or authority by its charter, or by the statute entitled "Railroad Companies," under which said railroad company received its charter, according to the provisions and terms of said act, to take and receive bonds and coupons in payment of the amount of stock pretended and alleged to have been subscribed by this defendant in said railroad company.

Defendant, further answering, states that on the 2nd day of July, A. D. 1860, the county court of Ray County made an order for an election, to be held in the various election-districts of said county, on the 13th day of August, 1860, for the purpose of obtaining the assent of the qualified voters of said county to a subscription of two thousand shares of stock in the Missouri River Valley Railroad Company, said shares of stock to be one hundred dollars each. That on the 8th day of November, 1860, the said county court canvassed the returns of said election and determined the result in favor of said subscription, and on the same day authorized, through agents appointed for that purpose, the said subscription to be made; that in obedience to said order of court the said subscription of two thousand shares was made, but that no bonds of Ray County were issued in payment of said stock so sub scribed for as aforesaid.

Defendant, for further answer, states that the Misssouri River Valley Railroad Company failed and refused to comply with the terms and conditions set forth in the order of said county court made on
22 the 2nd day of July, A. D. 1860, and that on the 4th day of April, A. D. 1864, the said county court, without any authority, either in the charter of said railroad company or by an election of the qualified voters of said county first had whereby the assent of said voters was obtained, made an order authorizing the agents appointed by said court to represent the interests of said county in said Missouri River Valley Railroad Company to transfer and assign to the North Missouri Railroad Company all of the effects and assets, rights and privileges belonging to the said Missouri River Valley Railroad Company. That the said transfer, so agreed upon and ordered by the county court of Ray County, was, on the 18th day of December, A. D. 1866, ratified and signed by the justices of the said county court without any authority of law, and which transfer, so made, did not bind the county of Ray for the subscription made to the Missouri River Valley Railroad Company.

Defendant, further answering, states that the North Missouri Railroad Company failed and refused to comply with the terms and agreements made and entered into by its officers and the justices of the county court

of Ray County, as is hereinbefore referred to; did, on the 15th day of April, A. D. 1868, at a general monthly meeting of its board of directors, held in S't Louis, Missouri, authorize and empower the president, in conjunction with the executive committee of said company, to
23 make such contracts with the S't Louis and S't Joseph Railroad Company to aid the building of said road, and also to release the county of Ray from its subscription of $200,000 to aid in building the West Branch of the North Missouri Railroad, upon the condition that this company is released from the constructing a spur from the West Branch to Richmond, and also upon the further consideration that Ray County will subscribe $250,000 stock, and secure the same, to be paid towards the building of the S't Louis and S't Joseph Railroad. That on the 19th day of May, 1868, the above proposition was presented to the county court of Ray County, and was by it duly considered and its acceptance declined. That said county court, on said 19th day of May, A. D. 1868, did, on its own motion, without any authority in the charter of the S't Louis and S't Joseph Railroad Company, or without the assent of the qualified voters of said county of Ray first had and obtained, authorize the transfer of subscription to two thousand shares of stock to the S't Louis and S't Joseph Railroad Company, upon the condition that the North Missouri Railroad Company release the county of Ray from the subscription hereinbefore referred to. That said release was made and signed by the North Missouri Railroad Company, and entered of record in the office for the recording of deeds in Richmond, Ray County, on the 8th day of July, A. D. 1868.

Defendant further states that the orders of the county court,
24 in Ray County, in substance hereinbefore set forth, are the only orders made by the said county court in any manner authorizing the making and execution of the bonds of said county to the S't Louis and S't Joseph Railroad Company; that under the terms and requirements of the constitution and general laws of the State of Missouri, two-thirds of the qualified voters of said county of Ray, or any other number, voting at any election, have never, at any time, given their assent at a general or special election held in said county to such subscription and authorized the issue of bonds to the S't Louis and S't Joseph Railroad Company; that no bonds of the denomination of one thousand dollars, or any other sum, with coupons attached, have been executed, issued, and delivered in accordance with the provisions of the constitution and laws aforesaid.

Defendant states that having fully answered all matters herein, prays to be dismissed with his costs, &c.

W. S. EVERETT,
JAMES L. FARRIS,
Attorneys for Defendant.

And afterwards, at the November term, A. D. 1874, of said circuit court, the following further proceedings were had in this case on the 17th November, 1874, to wit:

Replication filed.

HORATIO D. VANSYCKEL
vs.
RAY COUNTY. } No. 245.

25 Now comes the plaintiff by his attorneys, Philips & Vest, and files replication to the answer herein.

The replication filed as aforesaid is in the words and figures following, to wit:

Replication.

In the circuit court of the United States for the eight' circuit and western district of Missouri.

HORATIO D. VANSYCKEL, PLAINTIFF,
vs.
RAY COUNTY, DEFENDANT.

Now comes the plaintiff, and for reply to the new matter set up by defendant in its answer herein filed, says that it is not true, and plaintiff denies that the bonds issued and delivered by defendant, as in plaintiff's petition alleged, were unauthorized by defendant, and made without its knowledge or consent, and denies that plaintiff had knowledge of such facts.

Plaintiff says that he has no knowledge or information sufficient to form a belief whether the charter of the S't Louis and S't Joseph Railroad Company, or the general statute under which said company was organized, did not authorize any county, through which said railroad may be located, to subscribe to the stock of said railroad company, and issue bonds of such county to raise funds to pay the same, unless two-thirds of the qualified voters of such county first give their assent thereto. Nor has plaintiff any knowledge or information sufficient to form a belief
26 whether there was any election held in and by said county of Ray, in reference to making subscription to the stock, or loaning the credit of said county, to the S't Louis and S't Joseph Railroad Company.

Plaintiff denies that the S't Louis and S't Joseph Railroad Company had no power or authority by its charter, or by the statute under which it was organized, to take and receive bonds and coupons in payment of the stock subscribed by defendant to said company.

Plaintiff says he has no knowledge or information sufficient to form a belief whether the Missouri River Valley Railroad Company failed and refused to comply with the terms and conditions set forth in the order of the county court of Ray County, made on July 2nd, 1860, as stated by the answer, but plaintiff denies that on April the 4th, 1864, the said county court, without any authority, made an order authorizing its agents representing the interests of said county in said Missouri River Valley Railroad Company, to transfer and assign to the North Missouri Railroad Company, all of the effects and assets, rights and privileges belonging to said Missouri River Valley Railroad Company.

Plaintiff denies that said transfer so made on December the 18th, 1866, was without any authority of law, and denies that the same did
27 not bind the county of Ray for its subscription made to said Missouri River Valley Railroad Company.

Plaintiff says that he has no knowledge or information sufficient to form a belief whether the North Missouri Railroad Company failed and refused to comply with the terms and agreements made and entered into by its officers and the justices of said county court of Ray County, as alleged by the answer.

Plaintiff admits that the North Missouri Railroad Company afterwards proposed to said county court of Ray County to release said county from its subscription of $200,000 to aid in building the west branch of the

North Missouri Railroad, upon condition that said North Missouri Railroad Company should be released from the constructing a spur from the said west branch to Richmond, and also upon the further consideration that Ray County will subscribe $250,000 stock to the S't Louis and S't Joseph Railroad Company.

Plaintiff denies that said county court of Ray County, after declining said proposition, did on May 19th, 1868, without any authority, authorize the transfer of the subscription of two thousand shares of stock to the S't Louis and S't Joseph Railroad Company.

Plaintiff admits that said county court did make said subscrip-
28 tion to the S't Louis and S't Joseph Railroad Company, and that the North Missouri Railroad Company thereupon released the county of Ray from its subscription to the capital stock of said North Missouri Railroad Company.

Whether the order of said county court of Ray County, as set forth in defendant's answer, are the only orders of said court concerning the making said bonds to the S't Louis and S't Joseph Railroad Company, and whether said bonds were issued without any vote by the citizens of Ray County, plaintiff has no knowledge or information sufficient to form a belief.

Plaintiff further replying, states that the bonds to which the coupons sued upon were attached, were issued by the county court of Ray County, in payment of its subscription to the capital stock of the S't Louis and S't Joseph Railroad Company; that the defendant received for said bonds a certificate of stock to the full amount of said bonds from said company, and now holds the same; that said bonds were sold by said railroad company in the eastern markets, and plaintiff became the purchaser of the coupons sued upon herein, and the bonds to which they were attached, before the maturity of said bonds and coupons, and for value. That the proceed of the sale of said bonds and coupons were ex-
29 pended by said railroad company in constructing said railroad in Ray County, and the bonds were issued from time to time by the said county court as the work progressed, and in accordance with the terms of the order of subscription; that defendant having levied taxes for that purpose on the property of its citizens, has paid all the interest-coupons accruing upon said bonds from November the 2nd, 1868, to the time when the coupons herein sued upon became due. And plaintiff says that he purchased said bonds and coupons without any knowledge of the facts alleged in defendant's answer, and relying upon the recitals upon the face of said bonds, that they were issued under and pursuant to an order of the county court of Ray County, made under authority of the constitution of the State of Missouri and laws of the general assembly of the State of Missouri, and authorized by a vote of the people of said county at a special election held for that purpose.

Wherefore plaintiff says that defendant is estopped from its pretended defence herein, and he is entitled to judgment as prayed in his petition.

PHILIPS & VEST,
For Pl'ff.

And afterwards, at said last-mentioned term of said circuit court, the following further proceedings were had on the 18th day of November, 1874, to wit:

30 *Stipulation filed.*

HORATIO D. VANSYCKEL } No. 245.
vs.
RAY COUNTY. }

Now come the said parties by their attorneys and file stipulation for a continuance, and cause continued accordingly; which stipulation is as follows:

Stipulation.

In the circuit court of the United States, western district of Missouri.

HORATIO D. VANSYCKEL, PLAINTIFF, }
vs.
RAY COUNTY, DEFENDANT. }

It is hereby stipulated by and between Philips & Vest, attornies for plaintiff herein, and W. S. Everett, attorney for defendant, that it shall only be necessary for defendant to plead to one count of the petition, the other counts to abide the result as to that count. It is further agreed that plaintiff is admitted to be a bona-fide owner and holder of the bonds and coupons sued on herein, before maturity and for value, and without actual notice of the alleged defects set up by the answer in defence. It is further agreed that the plaintiff may before trial add to his petition counts upon other coupons of the same class and issue of bonds herein sued on, so as to make the amount sued for in this case exceed two thousand dollars.

PHILIPS & VEST,
For Pl'ff.
W. S. EVERETT,
Att'y for Def't.

31 And afterwards, on the 24th day of February, 1875, it being in vacation of said circuit court, the following amended petition was filed in this case, to wit:

First amended petition.

In the circuit court of the United States for the western district of Missouri.

HORATIO D. VANSYCKEL, PLAINTIFF, }
vs.
RAY COUNTY, DEFENDANT. }

Now comes the plaintiff and, by consent of counsel first had, files this his amended petition, and states that on January the first, 1874, the interest on bonds numbered 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, and 200, (which interest is represented by the coupons herewith filed,) became due, viz: Fifty coupons of forty dollars each, and amounting in the aggregate to two thousand dollars; the said bonds and coupons being of the same issue with the bonds and coupons sued on in the original petition.

Plaintiff states that he is the owner and bearer of said coupons, and that defendant refuses to pay the same or any part thereof. Wherefore plaintiff asks judgment for two thousand dollars, the amount of said coupons, and eight per cent. interest on each sum of forty dol-
32 lars, from the time each coupon became due, and for costs.

HENDERSON & SHIELDS and
PHILIPS & VEST,
For Pl'ff.

And afterwards, on the 2nd day of April, 1875, it being in vacation of said circuit court, the following second amended petition was filed in this case, to wit:

Second amended petition.

In the circuit court of the United States, western district of Missouri.

HORATIO D. VANSYCKLE, PLAINTIFF,
vs.
RAY COUNTY, DEFENDANT.

Now comes the plaintiff, and for his amended petition herein, by leave of court and consent of counsel of defendant, states that on January the first, 1874, the interest on bonds numbered 311, 312, 313, and 314 became due, being four coupons of eight dollars each, making in all thirty-two dollars; and that on January the first, 1874, the interest on bonds numbered 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, being fifty coupons of forty dollars each, making in all two thousand dollars, fell due; and that on January the first, 1874, the interest on bonds numbered 95, 96, 97, 98, 99, and 100 became due, being six coupons of eighty dollars each,
33 amounting to four hundred and eighty dollars. That said bonds are of the same issue with those sued upon in the original petition herein, a copy of one of which bonds is thereto attached.

Plaintiff states that he is the bearer of said bonds and coupons, and that defendant has neglected and still neglects, though often requested to pay said coupons, so to do, whereby defendant has become liable to pay, and an action has accrued to plaintiff to have and recover of defendant the sum of two thousand five hundred and twelve dollars, ($2,512,) the amount of said coupons, with interest at the rate of eight per cent. per annum on the amount of said coupons, respectively, from the time each of them became due.

Wherefore plaintiff asks judgment for said amount of $2,512, with interest as aforesaid, and costs.

PHILIPS & VEST,
For Pl'ff.

And afterwards, at the April term, 1875, of said circuit court, the following further proceedings were had in this case on the 23d day of April, 1875, to wit:

Hearing of cause argued and submitted.

HORATIO D. VANSYCKEL
vs.
RAY COUNTY. } No. 245.

This day come the parties by their attorneys, the plaintiff by Mess'rs

34 Henderson, Philips and Vest, and the defendant by W. S. Everett, esqr., and this case being regularly called for trial, both parties being ready, an agreement of counsel to waive a jury having been this day filed, this case was thereupon tried by the court sitting as a jury, and was argued by counsel and submitted to the court upon the pleadings and proofs.

The jury waiver, filed as aforesaid, is in the following words and figures, to wit:

Jury waiver.

In the circuit court of the United States, western district of Missouri.

HORATIO D. VANSYCKEL, PLAINTIFF,
vs.
THE COUNTY OF RAY, DEFENDANT.

It is hereby stipulated by and between Henderson & Shields and Philips & Vest, attornies for plaintiff herein, and Everett and Farris, attornies for defendant, that a jury is hereby waived for the trial of this cause in this court, and the same is submitted to the court for its finding and judgment.

HENDERSON & SHIELDS,
PHILIPS & VEST,
For Pl'ff.
EVERETT & FARRIS,
Att'ys for Defendant.

35 And afterwards, at said last-mentioned April term of said circuit court, the following further proceedings were had in this case, on the 24th day of April, A. D. 1875, to wit:

Finding of court & judgment.—Special finding of facts filed.

HORATIO D. VANSYCKLE
vs.
THE COUNTY OF RAY. } No. 245.

This day come again the parties by their respective attorneys, and this case having been heretofore tried by the court, sitting as a jury, and having been argued by counsel and submitted on the pleadings and proofs, on consideration whereof, and being fully advised in the premises, the court finds for the plaintiff on the issues joined herein, and that said defendant is indebted to the plaintiff by reason of the nonpayment of the coupons or interest-warrants in the petition described in the sum of five thousand five hundred and thirty-seven dollars and six cents, ($5,537.06,) and the special finding of the court is ordered to be filed and made a part of the record herein.

It is therefore now considered by the court that the plaintiff, Horatio D. Vansyckle, recover against the defendant, the county of Ray, in the State of Missouri, the sum of five thousand five hundred and thirty-seven dollars and six cents, ($5,537.06,) the amount so as aforesaid found to be due by the court, and the costs and charges herein expended, and that execution issue therefor.

MEM.—This judgment bears interest at the rate of seven per cent. per annum.

36 **Special finding of court as referred to in foregoing order is in words and figures as follows, to wit:**

Special finding of facts.—Extracts from Mo. statutes, &c.

HORATIO D. VANSYCKLE, PL'FF,
against
RAY COUNTY, DEF'T. } April term, 1875.

In the United States circuit court for the eighth circuit and western district of Missouri.

This cause coming on for trial, an agreement of counsel for plaintiff and defendant is filed in open court, whereby a jury is waived and the case submitted to the court; the court specially finds the facts to be as follows:

1. An act was passed by the general assembly of the State of Missouri on December 5th, 1859, to incorporate the Missouri River Valley Railroad Company, with power and authority to construct a railroad from any point on the North Missouri Railroad, in Randolph County, by way of Brunswick, in Chariton County, thence through Carroll, Ray, and Clay Counties to any point on the Missouri River in Platte County. The 20th section of this act authorized the county court of any county in which any part of the route of said railroad may be to sub-
37 scribe to the stock of said company, and to issue bonds in payment thereof.

"SECTION 20. It shall be lawful for the county court of any county in which any part of the route of said railroad may be to subscribe to the stock of said company, and it may invest its funds in the stock of said company, and may raise such funds by tax, to be voted by the legal voters of such county, in such manner as such county court may prescribe, for the purpose of paying such stock; and said county court may take proper steps to protect the interests of such county. Such county court may appoint an agent to represent the county, vote for it, and receive its dividends. Any incorporated city, town, or incorporated company may subscribe to the stock of said railroad company, and appoint an agent to represent its interests, give its vote, and receive its dividends, and may take proper steps to guard the interest of such city, town, or corporation. But the funds subscribed by any town or city must not be in bonds, but subscribed as prescribed for counties. And it shall be further lawful for any county court that may subscribe stock to levy and collect a special tax for the purpose of paying said subscriptions of stock; and shall deliver to each tax-payer special receipts for the amount of taxes so levied and paid, which said receipts shall
38 be transferable; and when any such receipts shall be procured or held to the amount of one hundred dollars by one individual, such person shall be entitled to a certificate of stock for one share of the capital stock of said company upon presentation of such receipts to the amount aforesaid. Cities and towns subscribing stock to said company may raise the funds in the same manner as herein prescribed for counties, and its tax-payers shall have all the advantages herein given to county tax-payers, and shall proceed in the same manner. An account shall be kept between counties, towns, and cities so subscribing the stock, and whenever a certificate of stock shall issue to any stock-payer said company shall call in an equivalent certificate due, to be held by such county, city, or town.

"SECTION 21. All the provisions of the general railroad law not inconsistent with this act shall be extended and apply to said company."

2. An act was passed by the general assembly, and approved March 30th, 1860, entitled "An act to amend the aforesaid act, and for other purposes," which said act is on pages 15 & 16 of the acts of the called session of February 27th, 1860.

"§ 3. The county courts, respectively, of the counties of Randolph, Chariton, Carroll, Ray, Clay, and Platte are hereby authorized and empowered to issue bonds of their respective counties upon the fol-
39 lowing terms and conditions: When either of the above-named counties shall have subscribed to the capital stock of the Missouri River Valley Railroad Company, or when either of said counties shall become the owner by purchase of stock in the capital stock of said company, then the county court of said county so subscribing or purchasing stock as aforesaid is hereby authorized and empowered to issue and deliver in payment of said subscription or purchase the bonds of the county in the sum of not exceeding one thousand dollars, each bond having not exceeding ten years to run to maturity, bearing interest at the rate of eight per cent. per annum, payable annually at the county seat of such county, or in the city of S't Louis, as the county court may prefer."

3. Under the provisions of this act and the general railroad law an order was made by the county court of Ray County providing for an election to be held in said county on the 13th day of August, 1860, on the question as to whether the county should take 2,000 shares, of $100.00 each, in the aforesaid railroad company; which said election was duly held and the stock accordingly legally subscribed by the county.

4. Afterwards, to wit, on the 10th day of February, 1864, an act was passed by the general assembly of the State of Missouri, ent tled
40 "An act for the extension and completion of the Pacific Railroad to the western boundary of the State at Kansas City, and the North Missouri Railroad to the Iowa State line—to complete the southwest branch of the Pacific Railroad, and to reduce the State indebtedness." The 12th section of said act is as follows:

"The Chariton and Randolph Railroad Company and the Missouri Valley Railroad Company may, by a vote of a majority of their stockholders in interest, transfer and assign to the North Missouri Railroad Company all of their effects and assets, rights and privileges, under their respective charters, and all the work that has been done in the construction of the said roads; and upon such transfer being accepted by the North Missouri Railroad Company, the said Chariton and Randolph Railroad Company and the Missouri Valley Railroad Company shall cease to have a corporate existence, and shall be styled and known as the west branch of the North Missouri Railroad; said west branch to commence at the town of Moberly, in the county of Randolph, on the North Missouri Railroad, and extend west along the route adopted by the Chariton and Randolph Railroad Company to the city of Brunswick; and thence on or near the present survey of the Missouri Valley Road to Richmond, in Ray County; and from thence by the most advantageous and practicable route to some point on the north side of the Missouri
41 River, at or below S't Joseph. And all the franchises vested in the said Chariton and Randolph Railroad Company and the Missouri Valley Railroad Company shall become, by such transfer and acceptance as aforesaid, fully and completely vested in the North Missouri Railroad Company; provided, however, that if the transfer and acceptance aforesaid is not made by and between the said Chariton and Randolph

Railroad Company, the Missouri Valley Railroad Company, and the North Missouri Railroad Company, and a connection thereby formed, as is contemplated may be done by this act, then, and in that event, the Missouri Valley Railroad Company shall have full power to issue the same amount in bonds herein provided to be issued by the North Missouri Railroad Company for the benefit of the said west branch of the North Missouri Railroad as aforesaid; said bonds, when issued by the Missouri Valley Railroad Company, to be issued in like manner, with like effect, and with the same lien on the Missouri Valley Road, in all respects, and to all intents and purposes, as if the same had been issued by the North Missouri Railroad Company for the benefit of said west branch. And provided further, no connection formed by and between the Chariton and Randolph Railroad Company, the Missouri Valley Railroad Company, and the North Missouri Railroad Company,
42 shall operate or have the effect to create any lien upon the said west branch aforesaid for any liabilities of said North Missouri Railroad, or for any State bonds issued for the benefit of said road prior to the transfer, acceptance, and connection provided for, as herein aforesaid, shall have been made. And provided further, that the said west branch shall not be liable for any of the indebtedness or liabilities of the main line of said North Missouri Railroad; that the accounts and business of the said North Missouri main line and the said west branch shall be kept separate and distinct from each other, so that one road shall not become or be held liable for the liabilities and indebtedness of the other."

5. The stockholders of the North Missouri Railroad Company accepted within sixty days after the passage of the aforesaid act the provisions of this act and filed their acceptance in the office of the secretary of state.

6. The Chariton and Randolph Railroad Company and the Missouri River Valley Railroad Company in April, 1864, legally transferred and assigned to the North Missouri Railroad Company all of their effects and assets, rights, and privileges under their respective charters,
43 together with all the work done on their respective roads, according to the provisions of the 12th section of said act.

7. An act was passed by the general assembly of the State of Missouri, approved February 16th, 1865, entitled "An act for the completion of the North Missouri Railroad and its west branch, and for the construction of a bridge over the Missouri River," which was duly accepted by the North Missouri Railroad Company. The 14th section of said act is as follows, to wit:

"§ 14. The North Missouri Railroad Company shall locate its west branch road from Richmond, in Ray County, through Clay County, and thence through Platte County to Weston, on the most practicable route; provided that the said Clay and Platte Counties shall each subscribe two hundred thousand dollars toward the construction of said west branch road; and if the said company do not find it practicable to locate their road so as to touch the Missouri River opposite the city of Kansas, then it shall be competent for said company at any time to construct a branch of their road from any point in Clay County to said city of Kansas, and may contract with the Kansas City, Galveston and
44 Lake Superior Railroad Company for so much of its road as may be desired for their main line or branch aforesaid."

8. On the 13th day of December, 1866, a contract was made and entered into between the North Missouri Railroad Company and the justices of the county court of Ray County, in the following words, to wit:

45 *Contract between N. Mo. R. R. Co. and Ray Co. Court.*

"Agreement of county court of Ray County and North Missouri Railroad Company.

"This contract and agreement, made and entered into by and between the county of Ray, in the State of Missouri, of the first part, and the North Missouri Railroad Company, of the State of Missouri, of the second part, witnesseth: That the contract heretofore entered into between the parties hereto is hereby changed, modified, and annulled, as herein specified, so far as it conflicts with anything contained in this contract and agreement.

"The North Missouri Railroad Company, for the consideration of one hundred and fifty thousand dollars, to be paid in the bonds of said county of Ray, hereby agrees and contracts to build, run, and operate the west branch of the North Missouri Railroad to the city of Richmond, in said county of Ray, by a spur of said west branch, and complete said spur connection with said city of Richmond by railroad within ninety days after the main or straight line of said west branch of the North Missouri Railroad is completed to a point opposite said city of Richmond, in said county of Ray aforesaid, and to erect the necessary depot buildings for freight and passengers to be transported to and from
46 Richmond, except those for stock, within the corporate limits of said city of Richmond, in said county of Ray, and the necessary stock-pens within a half mile of the said corporate limits of said city of Richmond aforesaid, and at such depots furnish the usual facilities furnished at depots between S't Charles and Macon City, or at the points on said west branch of said North Missouri Railroad having like demands for depot accommodations for business as said city of Richmond; and the depot buildings shall be as good at this time erected between S't Charles and Macon City, and their capacity will be increased from time to time as that company shall find the business requires, and that part of the road running up to said city of Richmond aforesaid shall be as good and equal in all respects to any other part of the road, except the grades will be steeper than on the main or straight line of said west branch of the North Missouri Railroad; and the North Missouri Railroad Company hereby further obligates itself and agrees to maintain and operate said west branch of its road, by the spur aforesaid, to the said city of Richmond, and run trains over the said road so extended and constructed to said city of Richmond, as aforesaid, to meet all regular daily trains for passengers and freight on the main or straight line of said west branch of said
47 road aforesaid that stop at the principal stations and depots along the main or straight line of said west branch of said North Missouri Railroad; and that all freight to go from the said city of Richmond, aforesaid, shall be received at and transported and carried by railroad from the depots in said city of Richmond aforesaid, and that all freight to go to said city of Richmond shall be transported and carried by railroad to the depots in said city of Richmond aforesaid, without change of cars, with the exception of express freight, and in case of accident or disabled cars; and the same rule shall be observed in regard to passengers, if there shall be a half car-load or more; if there shall be less than a half car-load, then it may be optional with said North Missouri Railroad Company to transfer and carry said passengers through to and from said city of Richmond or require the passengers to change cars at the junction with said main or straight line of

said road, and that said change of cars shall not operate as a delay further than the time required to change, but that passengers shall be transported and carried through by railroad to and from the depot in said city of Richmond, aforesaid, without any unnecessary delay by reason of said change of cars, as aforesaid; and the said North Missouri Railroad Company hereby agree and obligates itself to furnish to
48 said city of Richmond, aforesaid, such railroad facilities and accommodations for the transportation and carrying of freight and passengers to and from the depots in said city of Richmond, aforesaid, as it furnishes to depots of like importance, and as it would if said city of Richmond was located in the main or straight line of said west branch of the North Missouri Railroad.

"It is understood that the telegraph-line on the main line of the North Missouri Railroad does not belong to said North Missouri Railroad Company, but that the company, for its own business, has the use of the line for certain considerations in keeping the line in repair, transporting materials, &c., and that said railroad company will erect, or cause to be erected, to Richmond, a telegraph-line so soon as it has one erected on said west branch, as far as Richmond; and that, so far as said company may have control of the matter, the said city of Richmond shall have the same privileges that are allowed to other points reached by telegraph on said North Missouri Railroad. The said North Missouri Railroad Company agree to operate said road to the city of Richmond, in said Ray County, as long as any other part of the west branch is operated, and at no time in any way discriminate against said city of Richmond in rates for freight or passengers; but, on the contrary, that the
49 said company will keep in view the interests of said city of Richmond and the county of Ray aforesaid, and that said city of Richmond and county of Ray will in like manner endeavor to promote the interests of said North Missouri Railroad Company; and the said North Missouri Railroad Company obligates itself further never to aid, directly or indirectly, the building up of a town at the point of junction where the railroad spur departs to run to said city of Richmond aforesaid, except so far as it reserves the right to put up all such buildings at said point of junction aforesaid as time and experience shall show to be necessary for said road to have for the accommodation of its business at this point. And it is further agreed that such shops and engine-houses as may be wanted by said North Missouri Railroad Company at said city of Richmond, to operate said railroad to said point, shall be erected in or as near to it as ground can be economically had for the purpose. It being the true interest and spirit of this contract, and the North Missouri Railroad Company hereby agrees and obligates itself to furnish to said city of Richmond the same railroad facilities in all respects as it would have if said city of Richmond was located on the main or straight line of said west branch of the North Missouri Railroad. And in consideration that said county of Ray hereby con-
50 sents and agrees to accept the building, operating, and running the said west branch of the North Missouri Railroad to said city of Richmond, in said county of Ray, as herein-aforesaid, instead of the route and depot agreed upon heretofore, and releases said North Missouri Railroad Company from its former obligations, as herein specified, the said North Missouri Railroad Company hereby releases the said county of Ray from the sum of fifty thousand dollars of the stock heretofore subscribed for the construction of said west branch of the North Missouri railroad to said city of Richmond, in said county of Ray aforesaid. And the said North Missouri Railroad Company hereby agrees to

build and construct that portion of said railroad, herein aforesaid, from the main or straight line, as herein aforesaid, to the said city of Richmond aforesaid, so far as the grading is concerned, when said county of Ray issues its bonds for the said sum of one hundred and fifty thousand dollars to said North Missouri Railroad Company, so that it may be ready for the iron by the time the said west branch of said North Missouri Railroad reach' a point opposite the said city of Richmond aforesaid. That upon the issuing of said bonds by said county of Ray as aforesaid, the North Missouri Railroad Company hereby obligates itself to issue certificates of paid-up stock in the said North Mis-
51 souri Railroad Company to the said county of Ray for the said sum of one hundred and fifty thousand dollars. The bonds to be issued by said county of Ray as aforesaid, are to be prepared by the North Missouri Railroad Company, and the expenses of preparing them to be paid by said county of Ray. The said North Missouri Railroad Company hereby further obligates itself to carry to the said city of Richmond aforesaid, the usual mails that are carried to other points and stations on the main or straight line of said west branch of the North Missouri Railroad, when thereunto authorized by the Government.

"Witness whereof, the official signature of the president of the North Missouri Railroad Company, authorized by resolution of the board of directors of the North Missouri Railroad Company, with seal of company attached, and of the justice' of the county court of Ray County, of the State of Missouri, under the order of said court, with the official seal of said court attached, on this thirteenth day of December, A. D. 1866. Signed in duplicate.

"THE NORTH MISSOURI RAILROAD COMPANY,
[L S.] "By ISAAC H. STURGEON, *President.*
"CALVIN W. NARRAMORE,
[L. S.] "WILLIAM McKISSACK,
"WILLIAM CROWLEY,
"*Justices of the County Court of Ray County, Mo.*

"Filed for record December 18, 1866.

[40-cent U. S. revenue-stamp affixed.]

52 "STATE OF MISSOURI,
"*County of Ray, ss:*

"I, James T. Harris, recorder of deeds within and for the county and State aforesaid, certify that the above and foregoing is a true copy of an agreement made and entered into by and between the North Missouri Railroad Company and the county of Ray, in the State of Missouri, as the same appears of record in my office in book H, at page 20, and following.

"In testimony whereof I have hereunto set my hand and 'fixed my official seal, at my office in the city of Richmond, Mo., the 7th day of April, A. D. 1874.

[SEAL.] "JAMES T. HARRIS, *Recorder.*"

The following orders were passed and entered of record on the minutes of the county court of Ray County, to wit:

53 *Orders of Ray Co. Court.*

"The records of the county court of Ray County, Missouri.

"It is ordered by the county court of the county of Ray, in the State of Missouri, that a vote of the people of the county of Ray, in the State

of Missouri aforesaid, be taken on Monday, the 13th day of August, 1860, at the several places of voting, on the question as to whether the county of Ray shall take two hundred thousand dollars of stock in the Missouri River Valley Railroad Company upon the following conditions:

"First. That all of said county stock shall be expended in that part of the railroad in said county of Ray; that said subscription shall be payable in county bonds to run ten years, bearing interest at the rate of eight per cent., the interest to be paid annually.

"Thirdly. That no bond shall be issued or delivered to said company until provision shall be made for building the said railroad to the eastern boundary of the county of Ray, aforesaid. It is further ordered that the clerk of this county make out poll-books for two thousand shares of stock, of one hundred dollars each, amounting to two hundred thousand dollars, in the Missouri River Valley Railroad Company, by the county of Ray, to be subscribed by the county court, and against taking county stock in the Missouri River Valley Railroad Company; and that
54 notice be given by publishing a copy of this order in the Northwest Conservator, a newspaper published in the city of Richmond, and by six written or printed handbills posted in six public places in the county of Ray; and it is further ordered that there be judges appointed for the several voting precincts in said county of Ray; and it is ordered that John P. Quesenberry, James Patton, and Thomas J. Bohannan be, and are hereby, appointed judges for Richmond Township: Thomas Roe, Matt. Hamilton, and E. D. Porter, for Fishing River Township; Stokely William, David G. Stockwell, and William Cox, for Polk Township; L. H. Magill, Solomon Craven, and Henry Grimes, for Knoxville Township; Thomas McCuistron, W. L. Bransford, and Thomas Banister, for Grape Grove Township; Wilburn Snowdin, James Shackelford, and Argile Beggess, for Crooked River Township; John Elliott, W. D. McDee, and L. S. Menefe, for Camden Township."

"And afterwards, at the November term of said court, on Thursday, the 8th day of November, 1860, the following proceedings were had, viz:

"Whereas this court, on the 2d day of July, 1860, ordered that the question as to taking two thousand shares of stock, of one hundred dollars each, amounting to two hundred thousand dollars, in the Mis-
55 souri Valley Railroad Company, upon certain conditions therein mentioned, be submitted to the people of Ray County at an election to be held on the 13th day of August, 1860; and whereas at the said election 1,337 votes were cast in favor of the subscription of the said stock upon the conditions therein mentioned, and 623 votes were cast against the subscription, being a majority of the people and taxpayers of the county of Ray, in favor of the said subscription; and whereas the board of directors of the Missouri Valley Railroad Company being organized, and the books for the subscription of said stock have this day been opened: It is therefore ordered by the court that George M. Dunn, Joseph S. Hughes, and Austin A. King be, and they are hereby, appointed agents of the county of Ray, aforesaid, to subscribe and vote the said two thousand shares of stock, of one hundred *thousand* dollars each, amounting to two hundred thousand dollars, for the county of Ray, upon the conditions mentioned in the order of the court first above mentioned.

"And afterwards, at the April term of said court on Monday, the 4th day of April, 1864, the following proceedings were had, viz:

"Whereas the county of Ray has subscribed two thousand shares of stock to the Missouri Valley Railroad Company, amounting to the sum

of two hundred thousand dollars; and whereas, an election for directors of said Missouri Valley Railroad Company is to be held at Richmond, in the county of Ray aforesaid, on the 11th day of April, 1864, being on the second Monday in April for said year 1864:

"It is therefore ordered by the court that Joseph S. Hughes,
56 Willis Warriner, and Daniel Parker be, and they are hereby, appointed agents of the county of Ray aforesaid, to vote the said two thousand shares of stock, amounting to the sum two hundred thousand dollars as aforesaid, in the name, for and on behalf of the said county of Ray, for directors in the Missouri Valley Railroad Company as aforesaid, at the election to be held therefor as here aforesaid, and that the agents of county be instructed in the meeting of the stockholders of the Missouri River Valley Railroad Company in favor of transfer'ing and assigning to the North Missouri Railroad Company all of the effects and assets, rights, and privileges belonging to the said Missouri River Valley Railroad Company, under its charter, and all the work that has been done upon said Missouri River Valley Railroad Company as provided may be done by an act of the legislature, entitled 'An act for the extension and completion of the Pacific Railroad to the western boundary of the State, at Kansas City, and the North Missouri Railroad to the Iowa State line, to complete the southwest branch of the Pacific Railroad and to reduce the State indebtedness,' approved February 10th, 1864. Let the agents make written report of their action to the court, and then let the court have the report spread on its proceedings.

57 "And afterward, at the July term of the said court, on Saturday, the 16th day of July, 1864, were had the proceedings following, viz:

"Now, at this day comes D. Parker, Willis Warriner, and Joseph S. Hughes, agents, appointed by the county court of Ray County, in the State of Missouri, to represent the court, under the order of said court dated the 9th day of March, 1864, in casting the vote of said county for the directors of the Missouri River Valley Railroad Company, and for the purpose of voting the stock of the county in said Missouri River Valley Railroad Company, in favor of transfer'ing and assigning all of its effects and assets, rights, and privileges under its charter, and all the work that has been done on said road to the North Missouri Railroad Company as authorized by an act of the legislature of the State of Missouri, entitled 'An act for the extension and completion of the Pacific Railroad to the boundaries of the State at Kansas City, and the North Missouri Railroad to the Iowa State line, to *be* completed the south branch of the Pacific Railroad, and to reduce the State indebtedness,' approved February 19th, 1864.

"Report: That they cast the vote of said county in favor of the following-named persons as directors, viz: Clayton Tiffin, William-
58 F. Yates, George I. Wasson, W. W. Mosby, Henry C. Garner, Clayton Jacobs, John W. Shotwell, Christopher T. Garner, James Hughes, Lafayette S. Menefee, John B. Hale, Louis B. Eley, and Hiram Wilcoxon, and in favor of the transfer and assignment of all the effects and assets, rights, and privileges of the Missouri River Valley Railroad Company and the work done under its charter, to the North Missouri Railroad Company, which report is by the court approved and ordered to be filed and recorded.

"And afterward, at the December term of said court on Tuesday, the 18th day of December, 1866, the following proceedings were had, viz:

"It is ordered by the county court of the county of Ray, State of Missouri, in session on the 18th day of December, A. D. 1866, that the contract between the county of Ray and the North Missouri Railroad Company, bearing date December the 13th, A. D. 1866, executed by the North Missouri Railroad Company, be, and the same is hereby, ratified and signed by the justices of said county court with the seal of said court thereto affixed. And that the bonds of said county of Ray, amounting to one hundred and fifty thousand dollars, be issued according to the orders of the county court of said county of Ray, heretofore made,
59 and the stipulations of this contract.

"And afterward, at the December term of said court, on Wednesday, the 19th day of December, 1866, the following proceedings were had, viz:

"Ordered, That Isaac H. Sturgeon is hereby authorized and appointed as agent for the county of Ray, in the State of Missouri, to vote the stock of said county at the next election of directors for the North Missouri Railroad Company.

"And afterward, at the November term of said court, on the 2nd day of November, 1868, the following proceedings were had, viz:

"IN THE MATTER OF THE APPLICATION OF THE S't Louis and S't Joseph Railroad Company for issue of bonds.

"Whereas satisfactory evidence has been produced to this court that the first five miles of said road north of the west branch of the North Missouri Railroad has been put under contract, as provided in the order subscribing the stock of Ray County to said railroad company, it is therefore ordered by the court that fifty thousand dollars of the bonds of Ray County be issued to said railroad company, and that the presiding justice of this court sign, execute, and deliver the same to
60 said railroad company, or her representative, and that the clerk of this court attest and register the same in a book to be provided for that purpose. And further ordered, that said bonds be dated to bear interest from the first day of January, A. D. 1869, and the coupons to be payable annually on the first day of January of each year.

"And afterward, at the August adjourned term of said court, on the 8th day of September, 1869, the following proceedings were had, viz:

"IN THE MATTER OF THE APPLICATION OF THE S't Louis and S't Joseph Railroad Company for issue of bonds.

"Whereas the court is satisfied that five miles of the S't Louis and S't Joseph Railroad, in addition to the first five miles of said road north of the west branch of the North Missouri Railroad, in Ray County, has been graded and about ready for the ties, it is therefore ordered by the court that fifty thousand dollars of the bonds of Ray County be issued to said railroad company, and that the presiding justice of this court sign the same and deliver the same to the clerk of this court. And it is further ordered that the clerk of this court deliver to said railroad company said bonds when he shall be satisfied that said five miles of

road is fully graded and ready for the ties, and that the amount
61 of accumulated interest on said bonds to day of delivery be taken off in coupons.

"And afterward, at the November term of said court, on Thursday, the 4th day of November, 1869, the following proceedings were had, viz:

"IN THE MATTER OF THE APPLICATION FOR issue of county bonds to S't Louis and S't Joseph Railroad.

"Whereas this court is satisfied that five miles of the S't Louis and S't Joseph Railroad, in addition to the ten miles of said road north of the west branch of the North Missouri Railroad, is graded and ready for the ties, it is therefore ordered by the court that fifty thousand dollars of the bonds of Ray County be issued to said railroad company, and that the presiding justice of this court sign and execute the same, and that the clerk of this court attest the bonds and coupons and deliver the same to the president of the railroad company, or to any one whom he may direct to receive them.

"And afterward, at the February term of said court, on Tuesday, the 8th day of February, 1870, the following proceedings were had, viz:

"It is ordered that, before any more bonds be issued to the S't Louis and S't Joseph Railroad Company, that the officers of said railroad
62 company furnish to this court a sworn statement of the amount of Ray County bonds that have been sold by said company, and to whom sold and the amount realized and how applied, and that certificates for the amount of stock already paid, to wit, the sum of one hundred and fifty thousand dollars, by Ray County, be delivered to this court.

"It is further ordered that said bonds are issued upon the condition that the S't Louis and S't Joseph Railroad Company locate not less than two main and principal depots on said railroad west of Richmond, at the following points: the one at the most suitable place between the county line in Ray County and what is known as Walker's Store, and the other at a suitable point between Richmond and Walker's Store; and that said bonds are not to be delivered to said company until said depots are permanently located by said company as above specified.

"And afterward, at the February term of said court, on Wednesday, the 9th day of February, 1870, the following proceedings were had, viz:

"IN THE MATTER OF THE APPLICATION FOR issue of county bonds to S't Louis & S't Joseph Railroad Company.

"Whereas this court is satisfied that the remainder of the S't Louis and S't Joseph Railroad, in Ray County, to the western boundary
63 thereof, in addition to the fifteen miles of said road north of the west branch of the North Missouri Railroad, is graded and ready for the ties, it is therefore ordered by the court that the remaining fifty thousand dollars of the bonds of Ray County, being the balance of two hundred thousand dollars stock subscribed to said railroad company by Ray County, be issued to said railroad company, and that the presiding

justice of this court sign and execute the same, and that the clerk of this court attest the bonds and coupons and register the same, and deliver the same to the president of said railroad company.

"And afterward, at the August term of said court, on Friday, the 11th day of August, 1871, the following proceedings were had, viz:

"Whereas, in the opinion of this court, the bonds of the county of Ray, State of Missouri, heretofore issued to the S't Louis & S't Joseph Railroad Company, amounting in the aggregate to two hundred thousand dollars, ($200,000.00,) in payment of pretended stock of said Ray County in said railroad company, were issued without authority of law, and were and are null and void; it is therefore ordered by this court that neither the interest which has accrued, or may hereafter accrue, on said bonds, nor the principal of said bonds, nor any part thereof, shall be paid by said county.

64 "It is further ordered that the tax hereafter collected for the purpose of paying the interest and principal of said bonds shall be held and kept by the treasurer of Ray County, subject to the order or orders of this court, and that he shall not pay out any part of the same on account of interest or principal of said bonds. And it is further ordered that to the end and for the purpose of defending or prosecuting all suits in relation to the same, W. P. Hall and M. Oliver, attorneys at law, at S't Joseph, Missouri, copartners under the name and firm of Hall & Oliver, are hereby employed and retained as attorneys for said county of Ray.

"And afterward, at the February adjourned term of said court, on Wednesday, the 6th day of March, 1872, the following proceedings were had, viz:

"It is ordered by the court here that the orders heretofore made by this court on the eleventh day of August, 1871, relative to the payment of the principal or interest on the bonds of Ray County issued to the S't Louis & S't Joseph Railroad Company, be, and the same are hereby, rescinded. And it is further ordered that the treasurer of Ray County apply the funds in his hands belonging to the railroad fund to the payment of the interest on said bonds.

65 "And afterward, at the August term of said court, on Wednesday, the 6th day of August, 1873, the following proceedings were had, to wit:

"It is hereby ordered by the court that the treasurer of Ray County cause to be withdrawn from the American Exchange National Bank, of New York, all monies deposited therein for the payment of interest on bonds issued to the S't Louis & S't Joseph Railroad Company. And it is further ordered that he be, and is hereby, directed not to pay any interest on said railroad bonds until further ordered by this court.

"STATE OF MISSOURI,
"*County of Ray, ss:*

"I, George N. McGee, clerk of the county court within and for the county and State aforesaid, do hereby certify that the above and foregoing is truly copied from the records in my office.

"Witness my hand as clerk, and the seal of Ray County court hereto affixed. Done at office, in Richmond, this 30th day of March, A. D. 1874.

[SEAL.] "GEORGE N. McGEE, *Clerk.*"

66 10. The S't Louis and S't Joseph Railroad Company was organized into a corporation under the general railroad law in force at the time, and a copy of the articles of association appear below, and these articles contain its only corporate authority, to wit:

67 *Charter of S't Louis & S't Joseph R. R. Co.*

"Charter of the S't Louis & S't Joseph Railroad Co.

"OFFICE OF SECRETARY OF STATE,
"*City of Jefferson, Missouri.*

"I, Francis Rodman, secretary of state of Missouri, hereby certify that the annexed pages contain a true, complete, and full copy of the articles of association of the S't Louis & S't Joseph Railroad Company, as appears by comparing the same with the original copy of said articles of association now on file, as the law directs, in this office.

"In testimony whereof, I have hereunto set my hand and affixed my official seal. Done at office, this 13th day of January, A. D. 1868.

[SEAL.] "FRANCIS RODMAN,
"*Secretary of State.*

"ARTICLES OF ASSOCIATION

"For the formation and constitution of a body politic and corporate, to be called the S't Louis & S't Joseph Railroad Company, under the provisions and conditions of the general statutes of the State of Missouri, title 24, of private corporations, chapter 63, of railroad companies, 1865. Witnesseth, that the undersigned have formed themselves into a railroad company, under the name and style of 'the S't
68 Louis and S't Joseph Railroad Company,' and do hereby agree to become a body politic and corporate under and by virtue of the powers granted in the general statutes of the State of Missouri, of 1865, title 24, of private corporations, and particularly under chapter 63, of railroad companies, to possess the powers and privileges granted to corporations, and to be subject to the provisions relating thereto, under said title contained, for the following purpose, to wit:

"For the purpose of constructing, maintaining and operating a railroad for public use in the conveyance of persons and property, and for that purpose do make and sign the following articles of association:

"ARTICLE I. The name of this body politic and corporate shall be the Saint Louis and Saint Joseph Railroad Company.

"ART. II. This company shall continue for the period of ninety-nine years.

"ART. III. This railroad *company* shall be constructed, operated, and maintained from a point in the west branch of the North Missouri Railroad, at Richmond, in Ray County, in the most practicable route in a northwesterly direction through Plattsburg, to the city of S't Joseph, in Buchanan County.

"ART. IV. The length of this road will be about sixty-four miles, and is intended to be constructed through the following counties: Ray,
69 Clinton, and Buchanan.

"ART. V. The amount of the capital stock of this company shall be two millions of dollars, to consist of twenty thousand shares of one hundred dollars each.

"ART. VI. The following shall constitute a board of directors, who

shall manage the affairs of the company for the first year and until otherwise chosen in their places, to wit:

"James H. Robinson, of S't Joseph, Mo.
"Samuel Hays, " "
"Benjamin B. Frazer, " "
"L. M. Lawson, " "
"Thomas J. Chew, " "
"Thomas Harbine, " "
"Thomas B. Weakley, " "
"James H. Birch, j'r, of Plattsburg, Mo.
"Charles Ingles, " "
"Charles W. Porter, " "
"George J. Wasson, of Richmond, Mo.
"John G. Copelin, of S't Louis, Mo.
"C. C. Godfrey, of Hannibal, Mo.

"The number of directors of said company shall be thirteen.

"In witness whereof we have hereto set our names and places of residence and the amount of stock taken by each in the capital-stock of said company:

Names.	Residence.	No. shares.	Amount.
L. M. Lawson	S't Joseph, Mo.	50	$5,000 00
Samuel Hays	" "	50	5,000 00
70 T. J. Chew, j'r	" "	50	5,000 00
Thomas Harbine	" "	50	5,000 00
Ben. B. Frazer	" "	50	5,000 00
Tho's B. Weakley	" "	50	5,000 00
Ja's H. Robinson	" "	50	5,000 00
Ja's H. Birch, j'r	Plattsburg,	50	5,000 00
Charles Ingles	"	50	5,000 00
Charles W. Porter	"	50	5,000 00
George J. Wasson	Richmond, Mo.	50	5,000 00
John G. Copelin	S't Louis,	50	5,000 00
C. C. Godfrey	Hannibal,	50	5,000 00

STATE OF MISSOURI,
County of Buchanan, ss:

"This day personally appeared before me George J. Wasson, Charles Ingles, and L. M. Lawson, who, being duly sworn, on oath say that the amount of one thousand dollars per mile has been subscribed to the capital stock of the S't Louis & S't Joseph Railroad Company, in good faith, and five per cent. paid in cash thereon, and that it is intended, in good faith, to construct, maintain, and operate the road mentioned in the articles of association foregoing.

"L. M. LAWSON.
"GEORGE S. WASSON.
"CHARLES INGLES.

"Subscribed and sworn to before me this 31st day of December, A. D. 1867.

"Filed for record February 15th, 1868, at 1 p. m.

"GEORGE A. PEARCY, *Recorder*."

71 11. It appears that in pursuance of an order of the county court of Ray County, Missouri, dated May 19, 1868, the county

court of Ray County subscribed, on July 1st, 1868, to the capital stock of the S't Louis and S't Joseph Railroad Company the sum of two hundred thousand dollars, which said subscription was made upon the consideration, terms, and conditions named in the order of the county court, and which order is as follows.

72

73 And afterward, at the May term of said court, on the 19th day of May, 1868, the following proceedings were had, viz:

Order of Ray Co. court subscribing stock, &c.

"Whereas, by a vote of the people of Ray County, in the year 1860, two hundred thousand dollars was voted to be subscribed to the Missouri Valley Railroad, and to be applied and expended in the building and construction of said road within the county of Ray; and whereas by an act of the legislature subsequently passed, and by virtue of a contract made thereunder, the Missouri River Valley Railroad Company of the one part, and the North Missouri Railroad Company of the other part, among other stipulations of said contract, the Missouri River Valley Railroad Company transferred and assigned to the North Missouri Railroad Company the said subscription of two hundred thousand dollars so voted and to be applied as aforesaid; and whereas, subsequently, by an agreement with the North Missouri Railroad Company, said company, among other things, agreed and contracted to run or build a stem of their said railroad from some point on the west branch of said road and running to Richmond; for the building of which stem, and in consideration of the same, one hundred and fifty thousand dollars of said subscription was to be appropriated and applied; and

74 whereas the North Missouri Railroad Company have submitted the following proposition, to wit:

"'OFFICE NORTH MISSOURI RAILROAD COMPANY,
"'*S't Louis, April 15th*, 1868.

"'At a general monthly meeting of the board held this day the following resolutions were adopted:

"'Resolved, That the president of the company, in conjunction with the executive committee, be, and they are hereby, fully authorized and empowered to make such contracts with the S't Louis and S't Joseph Railroad Company to aid in the building of said road as may be consistent with the interest of this company, and also to release the county of Ray from its subscription of $200,000 to aid in building the west branch of the North Missouri Railroad, upon the condition that this company is released from constructing a spur from the west branch to Richmond; and also upon the further condition that Ray County will subscribe $250,000 stock and secure the same to be paid towards the building of the S't Louis and S't Joseph Railroad.

(Signed) "'F. WESTON, *Secretary.*'

"Which is by the court duly considered, and which the court here declines to accept; but in order that said two hundred thousand dollars may be applied to the purpose and object of constructing a railroad from the west branch of the North Missouri Railroad, through the

75 city of Richmond, in said county of Ray, to S't Joseph, it is therefore ordered by the court that the said sum of two hundred thou-

sand dollars be, and the same is hereby, transferred to the S't Louis and S't Joseph Railroad Company, to be applied in building, constructing, and operating that portion of the S't Louis and S't Joseph Railroad in Ray County north of the west branch of said North Missouri Railroad, upon the following express conditions, to wit: That the North Missouri Railroad Company shall, in due form of law, and in compliance with this order, file a sufficient release in writing in the recorder's office of Ray County, releasing said county of Ray from the said subscription of two hundred thousand dollars, and all the stipulations and obligations of the contract heretofore entered into by and between said county of Ray and the said North Missouri Railroad Company for the building of the branch or spur of their said road to Richmond hereinbefore referred to. The court hereby agreeing, upon the filing thereof, to said cancellation of said contract aforesaid, and release of said subscription aforesaid, and that said S't Louis & S't Joseph Railroad Company shall build, construct, run, and operate the S't Louis and S't Joseph Railroad through the corporated limits of the city of Richmond, in said county of Ray afore-
76 said, and establish a depot within the corporate limits of the city of Richmond, in the county of Ray aforesaid; and that upon the filing of said release by the North Missouri Railroad Company as aforesaid, the presiding justice of this court shall subscribe the said sum of two hundred thousand dollars as stock in the S't Louis and S't Joseph Railroad Company, upon the conditions specified in this order. And it is hereby ordered by the court that the bonds of the county of Ray, representing the said two hundred thousand dollars' subscription as aforesaid, be issued to the said S't Louis and S't Joseph Railroad Company upon the following terms and conditions, to wit: That fifty thousand dollars of said bonds be issued when this court shall be satisfied that five miles of the road in Ray County, north of the west branch of the North Missouri Railroad and beginning at the said west branch of said N. M. R. R., is under contract, and for the building of which and construction of which the said bonds or their proceeds are to be applied; fifty thousand dollars additional of said bonds to be issued when this court shall be satisfied that ten miles of this road shall be graded and ready for the ties of said road in Ray County; and that an additional fifty thousand dollars of said bonds to be issued when this court is satisfied that an additional five miles of said road in Ray County next after the ten miles
77 aforesaid has been graded and ready for the ties, and the last fifty thousand dollars of said bonds to be issued when this court shall be satisfied that the remainder of said road, to the western boundary-line of said county of Ray, is graded and ready for the ties; and that all of said sum of two hundred thousand dollars be applied in building, constructing, and operating said road in Ray County north of said west branch of the North Missouri Railroad. And it is further ordered that said bonds shall be prepared by the S't Louis and S't Joseph Railroad Company in such denominations as they may desire. Said bonds shall be payable ten years after date, and bear interest at the rate of eight per cent. per annum from the date thereof. And it is further ordered by the court that, in addition to the foregoing terms and conditions, *that* upon the application of said railroad company for the issuing of the second fifty thousand dollars in bonds as aforesaid, the same shall not be issued until said county court shall be satisfied that the first fifty thousand has been applied as heretofore required, and upon every subsequent application of said railroad company for the issuing of
78 bonds, as hereinbefore set forth, the same shall not be issued until the court shall be satisfied that all bonds previously issued

have been applied as herein required in building, grading, and constructing said road as herein aforesaid,

* * * * * * *

and that, in consideration thereof, the president of the North Missouri Railroad Company execute the contract of said company, releasing the county of Ray from the obligation of its subscription to said company, being in the following words and figures, to wit:

79 *Contract of N. Mo. R. R. Co. releasing Ray Co. from its subscription, &c.*

"OFFICE NORTH MISSOURI RAILROAD COMPANY,
"*S't Louis, 17th June*, 1868.

[50-cent U. S. revenue-stamp affixed.]

"At a general meeting of the board of directors held this day the following resolution was passed:

"Resolved, That, in compliance with an order of the county court of Ray County, made on the nineteenth day of May, 1868, this company does release the county of Ray from its subscription of two hundred thousand dollars to the stock of this company, and from all the stipulations and obligations of the contract heretofore entered into between the county of Ray and this company for the building of the branch or spur of our road to Richmond, the consideration of this release being the cancellation of the existing contract between this company and the county of Ray, and the subscription by said county of Ray to the stock of the S't Louis & S't Joseph Railroad Company, and that the president is authorized to execute all instruments which may be proper to carry into effect this resolution.

"Know all men by these presents that I, Barton Bates, president of the North Missouri Railroad Company, in compliance with a resolution of the board of directors of said company, and for and in the name of said company, do hereby release the county of Ray from its subscrip-
80 tion of two hundred thousand dollars to the stock of this company, and from all the stipulations and obligations of the contract hereto ore existing between the county of Ray and this company for the building of the branch or spur of the road of this company's road to Richmond, the consideration of this release being the entire cancellation of the existing contracts between the county of Ray and the North Missouri Railroad Company, and also the subscription by the county of Ray to the capital stock of the S't Louis & S't Joseph Railroad Company.

"In witness whereof I have hereto set my hand and caused the seal of said company to be hereto affixed this eighteenth day of June, eighteen hundred and sixty-eight.

[L. S.] "BARTON BATES, *President.*

"Filed for record July 8th, 1868.

"A. J. BARR,
"*Clerk and Recorder.*

"STATE OF MISSOURI,
"*County of Ray, ss:*

"I, James T. Harris, recorder of deeds within and for the county and State aforesaid, certify that the above and foregoing is a true copy of the release from the North Missouri Railroad Company to the county of

Ray, in the State of Missouri, as the same appears upon record in book Z, at page 268, and following.

81 "In witness whereof I have hereunto set my hand and affixed my official seal at my office in Richmond, Mo., the 7th day of April, A. D. 1874.

[SEAL.] "JAMES T. HARRIS, *Recorder.*"

12. Before making said order last aforesaid by the county court, the citizens of the county presented to the county court, signed by between twelve and fourteen hundred names, citizens of the county, petitions in the following language:

"To the honorable county court of the county of Ray:

"We, the undersigned, citizens of Ray County, respectfully petition your honorable body to transfer to the S't Louis and S't Joseph Railroad Company the subscription heretofore voted to the Missouri Valley Railroad Company, the North Missouri Railroad Company consenting thereto; and, as in duty bound, will ever pray," &c.

13. The stock originally subscribed to the Missouri River Valley Railroad Company was voted in said company, and after the transfer was voted in the North Missouri Railroad Company, under orders of the county court of said county.

82 14. In pursuance of said subscription and orders of the county court, $200,000 in face-value of bonds, with coupons attached, were issued by the county court and delivered to the S't Louis and S't Joseph Railroad Company, and four certificates of stock were issued by the said railroad company in payment thereof, and delivered to the county court. Said certificates are numbered 129, 130, 131, & 132, each for 500 shares of stock of $100.00 each in said company, each certificate being dated 11th of January, A. D. 1870.

15. The county court levied and collected a tax to pay interest due on said bonds for the years 1869, 1870, 1871, 1872, & 1873, and the coupons were paid annually for the first four years above named, and the county still retains the amount of money collected for the year 1873, under an order of the county court. It is admitted that the certificates of stock are still held by the county court, and that they have never been tendered by the said court back to the company for cancellation.

83 16. The North Missouri Railroad Company constructed its western branch from Moberly to Kansas City, running through the county of Ray for a distance of between 26 and 28 miles.

The S't Louis and S't Joseph Railroad Company constructed its road from opposite Lexington, through Richmond, locating a depot in Richmond, and continuing to the northwest boundary of said county a distance of 28 miles; and that said railroad is completed, and is now being operated to the city of S't Joseph, Missouri. On the first named road there are four depots located in Ray County, and on the latter five depots.

17. The coupons now sued on are for interest due on the bonds issued to the S't Louis and S't Joseph Railroad Company.

The following is a copy of bond and coupon:

Copy of bond & coupon sued on.

"No. 288. $100.

"STATE OF MISSOURI.

"*Ray County bond.*

"Issued in payment of the stock of the S't Louis and S't Joseph Railroad Company.

"TEN YEARS.

"Know all men by these presents that the county of Ray, in the State of Missouri, acknowledges itself indebted and firmly bound to
84 the S't Louis and S't Joseph Railroad Company in the sum of one hundred dollars, which sum the county promises to pay to the S't Louis and S't Joseph Railroad Company, or bearer, at the American Exchange National Bank, in the city of New York, in the State of New York, on the first day of January, A. D. 1879, together with the interest thereon from the first day of January, A. D. 1869, at the rate of eight per cent. per annum, which interest shall be payable annually on the presentation and delivery at the said bank of the coupons of interest hereto attached. This bond being issued under and pursuant to an order of the county court of Ray County, made under the authority of the constitution of the State of Missouri and the laws of the general assembly of the State of Missouri, and authorized by a vote of the people of said county at a special election held for that purpose.

"In testimony whereof the said county of Ray has executed th s bond by the presiding justice of the county court of said county, under the order of said court, signing his name hereto, and by the clerk of said court, under order thereof, attesting the same, and affixing thereto the seal of said court. This done at the town of Richmond, County
85 of Ray aforesaid, this second day of November, 1869.

[L. S.] "C. W. NARRAMORE,

"*Presiding Justice of the County Court of Ray County, Missouri.*

"Attest:

"GEO. N. McGEE,

"*Clerk of the County Court of Ray County, Mo.*

"$8.00.] *Coupon.*

"RICHMOND, RAY COUNTY, MISSOURI,

"*November 2d, A. D.* 1869.

"The county of Ray acknowledges to owe the sum of eight dollars, payable to bearer on the first day of January, A. D. 1874, at the American Exchange National Bank in New York, for one year's interest on bond No. 288.

"GEO. N. McGEE,

"*Clerk of County Court of Ray County, Mo.*"

18. The money realized from the sale of the bonds so issued as aforesaid was expended in the construction of the S't Louis and S't Joseph Railroad, in the county of Ray; and in consequence of this arrangement

the county of Ray secured the construction and operation within its limits of about 24 miles of railroad more than would have been built under the previous contract or arrangement with the North Missouri Railroad Company.

86 19. The plaintiff is a citizen of the State of New York, is the legal holder of the bonds & coupons sued on for value, and without actual notice or knowledge of any defects or any irregularities in the issue of the bonds.

20. The county court of Ray County did not, in fact, at any time, make any proposition or order by which the question was submitted to a vote of the citizens of Ray County to subscribe to the capital stock of the S't Louis and S't Joseph Railroad Company.

21. There was no election held at which the citizens of Ray County authorized the county court to subscribe to the capital stock of the S't Louis and S't Joseph Railroad Company, and issue bonds in payment of the same in any sum whatever.

22. The charter of the S't Louis and S't Joseph Railroad Company contained no provision by which the county court was authorized to subscribe to the capital stock of said railroad company without a vote of the people.

23. The county court appointed an agent to cast the vote of Ray County at an election of directors held by said S't Louis and S't
87 Joseph Railroad Company; but said agent did not vote the stock at said election, and that the stock was not voted by any agent or by the county court at any election held by said railroad company.

24. The North Missouri Railroad Company was a corporation duly organized under an act entitled "An act to incorporate the North Missouri Railroad Company," &c., approved March 3d, 1851, and the several acts amendatory thereof, and continued as such corporation from 1851 up to 1872.

The following are provisions from said acts. (See agreement of counsel, page 93.)

88

89 25. The said bonds were not issued and delivered in sums proportioned to assessments made upon the stockholders of the railroad company, but were issued in installments as the work progressed, and as stipulated in the order of the county court authorizing the subscription or issue thereof.

26. The S't Louis and S't Joseph Railroad Company was declared bankrupt by a judgment of the United States district court for the western district of Missouri, upon a petition of the creditors of said railroad company, in January, A. D. 1872.

Conclusions of law declared by the court.

Conclusions of law.

Upon the foregoing facts, the court finds, as a conclusion of law, that the plaintiff is entitled to recover on the coupons in suit, and that the forgoing facts do not constitute any defense to the said coupons in the hands of the plaintiff, and the court ordered final judgment accordingly for the plaintiff; to which finding and conclusion of law and judgment the defendant then and there duly excepted.

JOHN F. DILLON,
Circuit Judge.

90 And afterward, at said mentioned April term of said circuit court, the following further proceedings were had in this case, on the 3d day of May, 1875, to wit:

Writ of error allowed & citation signed.

HORATIO D. VANSYCKLE } No. 245.
vs.
RAY COUNTY.

Ordered that the writ of error this day presented to reverse the judgment hereinbefore rendered in favor of plaintiff be, and the same is hereby, allowed, and thereupon a citation admonishing said plaintiff to appear at and before the Supreme Court of the United States, on the second Monday of October next, is signed by the judge.

And afterward, during vacation of said court, and on the 10th day of May, 1875, the following proceedings were had in this case, to wit:

Bond for supersedeas approved & filed.

HORATIO D. VANSYCKLE } No. 245.
v.s
RAY COUNTY.

This day comes the said defendant, by its attorney, and files herein a supersedeas bond, which is approved by the honorable Arnold Krekel, one of the judges of this court, ordered to be filed and made a
91 part of the record herein; and it is further ordered that a supersedeas issue herein.

The above-mentioned bond being in words and figures as following, to wit:

Supersedeas bond.

Know all men by these presents that we, the county of Ray, in the State of Missouri, John Bales, William A. Donaldson, and W. R. Holman, of the county of Ray and State of Missouri, are held and firmly bound unto Horatio D. Vansyckle in the sum of ten thousand five hundred dollars, lawful money of the United States, to which payment well and truly to be made to the said Horatio D. Vansyckle, his certain attorney, executors, and administrators, *are* assigns, we do hereby bind ourselves, our successors, executors, and administrators, and every of them, jointly and severally, firmly, by these presents, sealed with our seals, and dated this first day of May, A. D. 1875.

Whereas the county of Ray, in the said State of Missouri, has sued out of the Supreme Court of the United States a writ of error to the circuit court of the United (States) for the eighth circuit and western district of Missouri, directed in a certain cause determined in said court, wherein the said Horatio D. Vansyckle is plaintiff, and the said county of Ray is defendant:

Now, the condition of this obligation is such, that if the above-
92 bounden county of Ray shall and do prosecute the said writ of error to effect, and shall and do answer all damages and costs if

the said county of Ray fail to make her plea good, then this obligation to be void; otherwise to be and remain in full force and virtue.

{ SEAL OF RAY COUNTY COURT, MO. } CHARLES J. HUGHES,
Sole Judge of the Ray County Court.
JOHN BALES. [SEAL.]
WILLIAM A. DONALDSON. [SEAL.]
W. R. HOLMAN. [SEAL.]

Attest:
A. A. McCUISTION,
County Clerk.

I, J. L. Farris, do upon oath declare that I am well acquainted with the pecuniary condition of the parties who signed the above bond, and know that John Bales is worth at least three thousand dollars; that William A. Donaldson is worth at least five thousand dollars; that William R. Holman is worth at least five thousand dollars; that each of the parties named are worth the amount specified after meeting all their liabilities, and *and* aside from the exemption the law entitles them to, and that their property mainly consists of real estate.

J. L. FARRIS.

Subscribed & sworn to this 10th day of May, 1875.
A. KREKEL, *Judge.*

93 And afterward, during vacation of said court, and on the 27th of July, 1875, the following agreement of counsel was filed, to wit:

Agreement of counsel as to certain acts of the Mo. legislature.

VANSYCKLE, PL'T'F,
vs.
RAY COUNTY, DEFENDANT.

In the circuit court of the United States for western district of Missouri.

In this case it is agreed between plaintiff and defendant that on the trial of the appeal in the Supreme Court of the United States either party may read any provision or sections of the acts of the general assembly of the State of Missouri under which the North Missouri Railroad Company and the S't Louis & S't Joseph Railroad Company were organized, and all acts amendatory thereof, together with the acts of said general assembly under which were organized the Missouri River Valley Railroad Company, the Chariton & Randolph Railroad Company, the Western Branch of the North Missouri Railroad Company, and any other acts touching the powers, privileges, and franchises of either one or all of said railroad companies.

94 And the portions of said acts so used shall be considered as constituting a part of the finding of the circuit court aforesaid, and as composing a part of the facts of said cause contained in said finding.

May , 1875.

J. B. HENDERSON,
For Plaintiff.
W. S. EVERETT,
For Defendant.

95 UNITED STATES OF AMERICA,
Western District of Missouri, ss:

I, Henry C. Geisberg, clerk of the circuit court of the United States for the western district of Missouri, do hereby certify that the writing hereto annexed is a true transcript of the record and proceedings in case No. 245, of Horatio D. Vansyckel against the county of Ray, in the State of Missouri, as fully as the same remain on file and of record in said case in this office.

I further certify that the addition inserted at the page numbered 54 was made before the signing of this certificate.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at office in the city of Jefferson, in said district, this 30th day of July, A. D. 1875.

[SEAL.] H. C. GEISBERG, *Clerk.*

96 Supreme Court of the United States.

HORATIO D. VANSYCKLE, PL'FF,
against
RAY COUNTY, DEF'T. } In error. Of October term, 1875.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Ray County, by William S. Everett, its attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid given was given for the said Horatio D. Vansyckle against the said Ray County; whereas by the law of the land the said judgment ought to have been given for the said Ray County against the said Horatio D. Vansyckle. That said judgment so rendered as aforesaid was against both law and evidence, and against the law under the evidence; and the said Ray County prays that the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that it may be restored to all things which it hath lost by occasion of the said judgment.

WILLIAM S. EVERETT,
Attorney for Plaintiff in Error.

(Indorsed:) Horatio D. Vansyckle against Ray County. Assignment of error. William S. Everett, attorney for pl'ff in error.

(Indorsement on cover:) No. 216. The County of Ray, plaintiff in error, vs. Horatio D. Vansycle. W. Missouri, C. C. U. S. Filed 15 October, 1875.

REC. 216—4

IN THE

SUPREME COURT

OF THE

UNITED STATES,

FOR THE

APRIL TERM, 1878.

RAY COUNTY, *Appellant,*

VERSUS

HORATIO D. VANSYCKLE, *Respondent.*

Philips & Vest and John D. Henderson,

COUNSEL FOR RESPONDENT.

SEDALIA DEMOCRAT PRINT.

IN THE
SUPREME COURT
OF THE
UNITED STATES.

RAY COUNTY, *Appellant*,

VERSUS

HORATIO D. VANSYCKLE, *Defendant in Error*

STATEMENT OF CASE.

On December 5th, 1859, the General Assembly of Missouri passed an act to incorporate the Missouri River Valley Railroad company, giving it authority to construct a railroad from any point on the North Missouri Railroad, in Randolph county, *via* Brunswick, Chariton county, thence through Carroll, Ray and Clay counties to any point on the Missouri river in Platte county. The 21st section of this act declares that all the provisions of the general railroad law not inconsistent with this act shall be extended and apply to said company.

The general railroad law existing at that time contained provisions as follows:

"SEC. 30. It shall be lawful for the county court of any county, and the city council of any city, to subscribe to the capital stock of any railroad company duly organized under this or any other act in this State, and the county court or city council subscribing or proposing to subscribe, to such capital stock, may, for information, cause an election to be held, to ascertain the sense of the taxpayers of such county or such city as to such subscription, and as to whether the same shall be paid by issues of county or city bonds, as the case may be, or by taxation."

"SEC. 31. Upon the making of such subscription by any county court or city, as provided for in the previous section, such county or city shall thereupon become, like other subscribers to such stock, entitled to the privileges granted, and subject to the liabilities imposed by this act, or by the charter of the company in which such subscription shall be made. And, in order to raise funds to pay the installments which may be called for, from time to time, by the board of directors of such railroad, it shall be the duty of the county court or city council making such subscription to issue their bonds, or levy a special tax upon all property and taxables made taxable by law for State and county purposes," etc., etc., etc.

On March 30, 1860, an act was approved to amend the aforesaid act, the third section of which is as follows:

"The county courts respectively of the counties of Randolph, Chariton, Carroll, Ray, Clay and Platte are hereby authorized and empowered to issue bonds of their respective counties upon the following terms and conditions: When either of the above named counties shall have subscribed to the capital stock of the Missouri River Valley Railroad company, or when either of the said counties shall become the owner by the purchase of stock in the capital stock of said company, then the county court of said county so subscribing or purchasing stock as aforesaid, is hereby authorized and empowered to issue and deliver in payment of said subscription or purchase the bonds of the county, in the sum of not exceeding one thousand dollars each bond, having not exceeding ten years to run to maturity, bearing interest at the rate of eight p r cent. per annum, payable annually at the county seat of said county, or in the city of St. Louis, as the county court may prefer."

Under the provisions of this act, and the general railroad law, the county court, on the 2d day of July, 1860, ordered that an election be held on the 13th of August following, submitting to a vote of the people whether the county of Ray should take two hundred thousand dollars of stock in said company. The election was accordingly held and 1337 votes were cast in favor of the subscription, and 623 votes against it. The poll books of said election were examined on the 8th day of November, 1860, by the county court, and the result declared and entered of record; whereupon three commissioners were appointed to subscribe said stock upon the books of the company, which was accordingly done. Afterwards, on the 10th day of February, 1874, an act was passed by the General Assembly of Missouri, entitled, "An act for the extension and completion of the Pacific railroad to the

western boundary of the State, at Kansas City, and the North Missouri railroad to the Iowa State line," etc.

The 12th section of said act is as follows:

"The Chariton and Randolph Railroad company and the Missouri Valley Railroad company may, by a vote of a majority of their stockholders in interest, transfer and assign to the North Missouri Railroad company all their effects and assets, rights and privileges under their respective charters, and all the work that has been done in the construction of the said roads; and upon such transfer being accepted by the North Missouri Railroad company, the said Chariton and Randolph Railroad company and the Missouri Valley Railroad company shall cease to have a corporate existence, and shall be styled and known as the West branch of the North Missouri Railroad; the said West branch to commence at the town of Moberly, in the county of Randolph, on the North Missouri Railroad, and extend west along the route adopted by the Chariton and Randolph Railroad company, to the city of Brunswick; and thence on or near the present survey of the Missouri Valley Road to Richmond, in Ray county; and from thence by the most advantageous and practicable route to some point on the north side of the Missouri river, at or below St. Joseph. And all the franchises vested in said Chariton and Randolph Railroad company, and in the Missouri Valley Railroad company, shall become by such transfer and acceptance as aforesaid fully and completely vested in the North Missouri Railroad company; *provided, however*, that if the transfer and acceptance aforesaid is not made by and between the said Chariton and Randolph company, the Missouri Valley Railroad company and the North Missouri Railroad company, and a connection thereby formed, as is contemplated may be done by this act, then, and in that event, the Missouri Valley Railroad company shall have full power to issue the same amount in bonds herein provided to be issued by the North Missouri Railroad company, for the benefit of the said West branch of the North Missouri Railroad as aforesaid. Said bonds when issued by the Missouri Valley Railroad company, to be issued in like manner, with like effect, and with the same lien on the Missouri Valley Road, in all respects, and to all intents and purposes, as if the same had been issued by the North Missouri Railroad company for the benefit of the said West branch; *and provided further*, that no connection formed by and between the Chariton and Randolph Railroad company, the Missouri Valley Railroad company and the North Missouri Railroad company, shall operate or have the effect to create any lien upon the said West branch aforesaid, for any liabilities of the said North Missouri Railroad, or for any State bonds issued for the benefit of said road prior to the transfer, acceptance, and connection provided for as herein aforesaid, shall have been made; *and provided further*, that the said West branch shall not be liable for any of the indebtedness or liabilities of the main line of the North Missouri Railroad; that the accounts and business of the said North Missouri main line and the said West branch shall be kept separate and distinct from each other, so that one road

shall not become or be held liable for the liabilities and indebtedness of the other."

The stockholders of the North Missouri Railroad company accepted the provisions of this act, and filed their acceptance, as required, in the office of the Secretary of State.

On the 4th day of April, 1864, the county court of Ray county appointed agents to vote its stock for directors of the Missouri River Valley Railroad company, and at the same time ordered and directed said agents to vote in the meeting of stockholders of the said Missouri River Valley Railroad company in favor of transferring and assigning all the effects and assets, rights and privileges of the said company to the North Missouri Railroad company, according to the provisions of the act of February 10, 1864.

On July 16, 1864, the agents so appointed reported to the court that they had cast the vote of Ray county as above directed, and their report was approved by the court, and ordered to be filed and recorded.

On February 16, 1865, the legislature passed "An act for the completion of the North Missouri Railroad and its West branch, and for the construction of a bridge over the Missouri river," which was duly accepted by the stockholders of the North Missouri Railroad company. The following is a section of said act:

"SEC. 14. The North Missouri Railroad company shall locate its West branch road from Richmond, in Ray county, through Clay county, and thence through Platte county, to Weston, on the most practicable route; *provided*, that the said Clay and Platte counties shall each subscribe two hundred thousand dollars toward the construction of said West branch road; and if the said company do not find it practicable to locate their road so as to touch the Missouri river opposite to the City of Kansas, then it shall be competent for said company at any time to construct a branch of the road from any point in Clay county to said City of Kansas, and may contract with the Kansas City, Galveston and Lake Superior Railroad company for so much of its road as may be desired for their main line or branch aforesaid."

The counties of Clay and Platte failing to subscribe, the North Missouri company located its West branch on a direct line from Moberly, in Randolph county, along the valley of the Missouri river to Kansas City. The city of Richmond, in Ray county, is situated on the uplands, several miles removed from the valley of the Missouri river,

which would cause a curve in the line of the North Missouri Road, adding to the length of the road and greatly increasing the grade. To avoid these difficulties the railroad company agreed with the county court to remit fifty thousand dollars of the subscription, and instead of running the main line through the city of Richmond, to build and and operate a spur from a convenient point on the main line of said west branch.

The North Missouri Railroad company, by the 9th section of the act of January 7, 1853, was authorized "to construct lateral or branch roads to any points."

See session acts 1853, p. 326.

The contract between the company and the county is dated on December 13, 1866, and is set out in full on pages 19, 20 and 21 of the printed record.

On the 19th day of December, A. D. 1866, the county court appointed an agent to vote its stock in the North Missouri Railroad company.

On the 13th of January, A. D. 1868, the St. Louis and St. Joseph Railroad company was organized under the general railroad law of the State, with authority to construct and operate a road from a point on the West branch of the North Missouri Railroad, at Richmond, in Ray county; thence on the most practicable route in a northwesterly direction through Plattsburg to the city of St. Joseph, in Buchanan county. Thereafter at the May term of said court, 1868, and on the 19th day of said month, the following order was adopted and entered of record:

WHEREAS, By a vote of the people of Ray county, in the year 1860, two hundred thousand dollars was voted to be subscribed to the Missouri Valley Railroad, and to be applied and expended in the building and construction of said road within the county of Ray;

And whereas, By an act of the legislature subsequently passed, and by virtue of a contract made thereunder, the Missouri River Valley Railroad company of the one part, and the North Missouri Railroad company of the other part, among other stipulations of said contract, the Missouri River Valley Railroad company transferred and assigned to the North Missouri Railroad company the said subscription of two hundred thousand dollars so voted and to be applied as aforesaid;

And whereas, Subsequently, by an agreement with the North Missouri Railroad company, said company, among other things, agreed and contracted to run or build a stem of their said railroad from some point on the West branch of said road and running to Richmond, for the building of which stem, and in consideration of the same, one hundred and fifty thousand dollars of said subscription was to be appropriated and applied; and

And whereas, The North Missouri Railroad company have submitted the following proposition, to-wit:

"OFFICE NORTH MISSOURI RAILROAD COMPANY,
ST. LOUIS, April 15th, 1868.

"At a general monthly meeting of the board, held this day, the following resolutions were adopted:

"*Resolved*, That the president of the company, in conjunction with the executive committee, be, and they are hereby fully authorized and empowered to make such contracts with the Saint Louis and Saint Joseph Railroad company to aid in the building of said road, as may be consistent with the interests of this company, and also to release the county of Ray from its subscription of $200,000 to aid in building the West branch of the North Missouri Railroad, upon the condition that this company is released from constructing a spur from the West branch to Richmond; and also upon the further condition that Ray county will subscribe $250,000 stock, and secure the same to be paid towards the building of the Saint Louis and Saint Joseph Railroad.

(Signed,) F. WESTON, Secretary."

"Which is by the court duly considered, and which the court here declines to accept; but in order that said two hundred thousand dollars may be applied to the purpose and object of constructing a railroad from the West branch of the North Missouri Railroad, through the city of Richmond, in said county of Ray, to St Joseph, it is therefore ordered by the court that said sum of two hundred thousand dollars be, and the same is hereby transferred to the St. Louis and St. Joseph Railroad company, to be applied in building, constructing and operating that portion of the St. Louis and St. Joseph Railroad in Ray county north of the West branch of the said North Missouri Railroad, upon the following express conditions, to wit: That the North Missouri Railroad company shall, in due form of law, and in compliance with this order, file a sufficient release in writing, in the recorder's office of Ray county, releasing said county of Ray from the said subscription of two hundred thousand dollars, and all the stipulations and obligations of the contract heretofore entered into by and between said county of Ray and the said North Missouri Railroad company for the building of the branch or spur of their said road to Richmond heretofore referred to. The court hereby agreeing, upon the filing thereof, to said cancellation of said contract aforesaid, and release of said subscription aforesaid, and that said St. Louis and St. Joseph Railroad company shall build, construct, run and operate the St. Louis and St. Joseph Railroad through the corporate limits of the city of

Richmond, in said county of Ray aforesaid, and establish a depot within the corporate limits of the city of Richmond, in the county of Ray aforesaid; and that upon the filing of said release by the said North Missouri Railroad company as aforesaid, the presiding justice of this court shall subscribe the said sum of two hundred thousand dollars as stock in the St. Louis and St. Joseph Railroad company, upon the conditions specified in this order. And it is hereby ordered by the court that the bonds of the county of Ray, representing the said two hundred thousand dollars subscription as aforesaid, be issued to the said St. Louis and St. Joseph Railroad company upon the following terms and conditions, to wit: That fifty thousand dollars of said bonds be issued when this court shall be satisfied that five miles of the road in Ray county, north of the West branch of the North Missouri Railroad, and beginning at the West branch of the said N. M. R. R., is under contract, and for the building of which, and construction of which, the said bonds, or their proceeds, are to be applied; fifty thousand dollars additional of said bonds to be issued when the court shall be satisfied that ten miles of this road shall be graded and ready for the ties of said road in Ray county; and that an additional fifty thousand dollars of said bonds to be issued when this court is satisfied that an additional five miles of said road, in Ray county, next after the ten miles aforesaid, has been graded and ready for the ties; and the last fifty thousand dollars of said bonds to be issued when this court shall be satisfied that the remainder of said road to the western boundary line of said county of Ray is graded and ready for the ties; and that all of said sum of two hundred thousand dollars be applied in building, constructing and operating said road in Ray county, north of said West branch of the North Missouri Railroad. And it is further ordered, that said bonds shall be prepared by the St. Louis and St. Joseph Railroad company in such denominations as they may desire. Said bonds shall be payable ten years after date, and bear interest at the rate of eight per cent. per annum from the date thereof. And it is further ordered by the court that in addition to the foregoing terms and conditions, that, upon the application of said railroad company for the issuing of the second fifty thousand dollars in bonds as aforesaid, the same shall not be issued until said county court shall be satisfied that the first fifty thousand has been applied as heretofore required; and upon every subsequent application of said railroad company for the issuing of bonds as hereinbefore set forth, the same shall not be issued until the court shall be satisfied that all bonds previously issued have been applied as herein required, in building, grading and constructing said road as herein aforesaid."

* * * * * * * *

"And that in consideration thereof, the president of the North Missouri Railroad company execute the contract of said company, releasing the county of Ray from the obligation of its subscription to said company, being in the following words and figures, to wit:"

CONTRACT OF NORTH MISSOURI RAILROAD COMPANY RELEASING RAY COUNTY FROM ITS SUBSCRIPTION, ETC., ETC.

(50 cent U. S. revenue stamp affixed.)

"OFFICE N. M. R. R. COMPANY,
ST LOUIS, 17th June, 1868.

"At a general meeting of the board of directors, held this day, the following resolution was passed:

"*Resolved*, That, in compliance with an order of the county court of Ray county, made on the nineteenth day of May, 1868, this company does release the county of Ray from its subscription of two hundred thousand dollars to the stock of this company, and from all the stipulations and obligations of the contract heretofore entered into between the county of Ray and this company, for the building of the branch or spur of our road to Richmond, the consideration of the release being the cancellation of the existing contract between this company and the county of Ray, and the subscription by said county of Ray to the stock of the St. Louis and St. Joseph Railroad company, and that the president is authorized to execute all instruments which may be proper to carry into effect this resolution."

"*Know all men by these presents*, That I, Barton Bates, president of the North Missouri Railroad company, in compliance with a resolution of the board of directors of said company, and for and in the name of said company, do hereby release the county of Ray from its subscription of two hundred thousand dollars to the stock of this company, and from all the stipulations and obligations of the contract heretofore existing between the county of Ray and this company, for the building of the branch or spur of the road, of this company's road, to Richmond, the consideration of this release being the entire cancellation of the existing contracts between the county of Ray and the North Missouri Railroad company, and also the subscription by the county of Ray to the capital stock of the St. Louis and St Joseph railroad company.

"*In witness whereof*, I have hereunto set my hand, and caused the seal of said company to be hereto affixed, this eighteenth day of June, eighteen hundred and sixty-eight.

[L. S.] BARTON BATES, President.

"A. J BARR, Clerk and Recorder.

"Filed for record July 8th, 1868"

STATE OF MISSOURI, } ss.
COUNTY OF RAY, }

I, James I. Harris, recorder of deeds within and for the county and State aforesaid, certify that the above and foregoing is a true copy of the release from the North Missouri Railroad company to the county of Ray, in the State of Missouri, as the same appears upon the record in book Z, at page 268, and following.

In witness whereof I have hereunto set my hand and affixed my official seal, at my office, in Richmond, Mo., the 7th day of April, A. D. 1874.

[SEAL.] JAMES I. HARRIS, Recorder.

On the 17th of June, A. D. 1868, the Board of Directors of the North Missouri Railroad company, passed a resolution authorizing its president to execute an instrument releasing the county of Ray from its subscription of two hundred thousand dollars to the stock of said company, in consideration of the rescision of existing contracts between the said county and the North Missouri Railroad company, and in consideration also that the county would transfer its subscription of two hundred thousand dollars to the capital stock of the St. Louis and St. Joseph Railroad company, and issue its bonds in said amount to said last named company.

The resolution of the Board of Directors, and the instrument executed by the president of the company, are in the language and terms of the aforesaid order of the county court. (See record, p. 31.)

Before the county court passed the order of May 19, 1868, petitions were presented to the court, signed by between twelve and four teen hundred names, in the following language: "To the honorable county court of the county of Ray: We, the undersigned citizens of Ray county, respectfully petition your honorable body to transfer to the St. Louis and St. Joseph Railroad company the subscription heretofore voted to the Missouri Valley Railroad company, the North Missouri Railroad company consenting thereto; and as in duty bound will ever pray," etc., etc. Thereupon the county court subscribed the two hundred thousand dollars to the St. Louis and St. Joseph Railroad company, and issued the bonds of the county to the amount of two hundred thousand dollars in installments of fifty thousand dollars each, and received therefor four certificates of stock, dated January 11, A. D. 1870, which certificates the county still retains. The orders of the court providing for the issue of said bonds will be found on pages 24, 25 and 26 of the printed record.

The form of the bond and coupon issued by the county court will be found on page 33 of the printed record. The bond contains the following recitals: "This bond, being issued under and pursuant to an order of the county court of Ray county, made under the authority of the constitution of the State of Missouri, and the laws of the General

Assembly of the State of Missouri, and authorized by a vote of the people of said county, at a special election held for that purpose." The county court levied and collected a tax to pay interest on said bonds for the years 1869, 1870, 1871, 1872 and 1873, and the coupons were actually paid for the first four years thereof, and the county still retains the tax collected for the year 1873. The stock certificates have never been tendered back to the company for cancellation.

The North Missouri Railroad company constructed and is operating its western branch from Moberly to Kansas City, running east and west through the county of Ray for a distance of 28 miles.

The St. Louis and St. Joseph Railroad company constructed and is operating its road from the West branch of the North Missouri, through Richmond, locating a depot in Richmond, to the city of St. Joseph, and passing through Ray county in a northwesterly direction for a distance of 29 miles. There are four depots located in Ray county, on the North Missouri road, and five depots on the St. Louis and St. Joseph road.

The money realized from the sale of the bonds was all expended in building the St. Louis and St. Joseph railroad in the county of Ray; and in consequence of the said arrangement made with the North Missouri Railroad company, the county secured the construction and operation within its limits of 24 miles of railroad more than would have been built under the previous contract and agreement with the North Missouri Railroad company.

On which state of facts, the circuit court, as a conclusion of law, held that the plaintiff was entitled to recover, and gave judgment accordingly.

After an ineffectual motion for a new trial, the defendant below brings the case here on appeal.

POINTS AND AUTHORITIES SUBMITTED ON BEHALF OF RESPONDENT.

I.

Did the county court of Ray county have authority, under any law, general or special, to issue this bond? It did. The St. Louis

and St Joseph Railroad company was organized into a corporation December the 31st, 1867, under the general railroad law of the State of Missouri.

Sec. 17, chap 63, General Stat Mo., 1865, Title, "Of Railroad Companies," provides:

"It shall be lawful for the county court of any county * * * * to take stock for such county * * * * or loan the credit thereof to any R. R. Co. duly organized under this or any other law of the State; *provided*, that two-thirds of the qualified voters of such county, at a regular or special election, to be held therein, shall assent to such subscription."

The ordering and entire superintendence of such elections are under the special jurisdiction and supervision of the justices of the county courts.

Title 2, Ch. 2, Gen. Stat. Mo., 1865.

These justices determine and announce the result of all such elections, and are the exclusive judges of the result thereof.

The bond in question recites that it was "issued under and pursuant to an order of the county court of Ray county, made under the authority of the constitution of the State of Missouri, and authorized by a vote of the people of said county, at a special election held for that purpose"

What is the authority of the constitution and the laws of the general assembly referred to? Evidently it is that expressed in Sec. 14, Art 11, of the constitution of 1865, and Sec. 17, pg. 338, of the Gen. Stat. above quoted, requiring, each of them, a two-thirds vote of the electors

The duly accredited agents of this county, constituted by the law of the State, the sole judges of the fact, certify upon the face of this bond that it was issued under and pursuant to their order and *under the authority* of the constitution and the laws of the general assembly of the State, and that it was *authorized* by a vote of the people of their county, at a special election held for that purpose. These statements in substance and effect are, that the requirements of both the constitution and the statute were complied with in the issue of this bond; for the act could not be under the authority of the constitution

and the law, without a compliance with the fundamental requirements of the provisions of each. And, as if to leave no doubt on the mind of any purchaser who should deal with the bond, it recites the further fact that it was *authorized* by a vote of the people, at a special election, held for that particular purpose. If it was not such a vote as was required by law, the county justices could not have truthfully said that it authorized them to make the bond.

II.

The authority to make the subscription in question is derived primarily from the legislative act, and not the vote of the people.

As early as 1863, the Supreme Court of Missouri, in Flagg vs. City of Palmyra, 33 Mo., 450, say:

"We hold the bondholders to a knowledge of all that is contained in the act of the general assembly, etc.; but (in the absence of actual notice) *do not hold* them bound to enquire *whether an election had been held* as to the making of a subscription of stock * * * * or as to the regularity of such an election, or the qualifications of the voters thereat."

And in 1873, Napton, Judge, in Smith vs. Clark county, 54 Mo., 76, after quoting with approval the case *supra*, says:

"It is said that the power to subscribe is derived from the people of the county or city, and if this be conceded, a fraudulent or unfair and illegal election is as fatal to the exercise of the power as a subscription without any election at all. But *the power is derived from the law*, without which the unanimous vote of every voter in the county or city could not confer it. The law gives the power, but restricts its exercise by requiring an election These municipal subdivisions are authorized to issue negotiable securities upon certain conditions, and one of the conditions is not complied with. All the conditions, restrictions and limitations are equally binding; the absence of one of the prerequisites is as fatal as another"

The learned Judge then proceeds, by an accumulation of irresistable authority, to show that the buyer of such paper is not bound to enquire whether the prerequisites have been complied with, but is authorized to assume that the officers have done their duty. as the bonds upon their face certify.

In Grand Chute vs. Wineger, 15 Wall., 356, the question as to the essentiality of an election came up in such a manner as to leave no possible ground of doubt as to the view of this court. It arose on a

demurrer to the plea alleging, "that no special election, such as the act prescribed, had been called or held previous to the issue of the bonds."

The act provided, "that no bonds shall be issued" unless the required vote was given. The demurrer was sustained by the circuit court and affirmed by the supreme court.

In Supervisors vs. Schenck, 5 Wall, 784, the court, in a unanimous opinion, say:

"Argument of the defendants proceeds upon the ground that if they can show that the order for the election emanated from the wrong source, the plaintiff, although an innocent holder for value, cannot recover; but it is clear, that in a case like the present, *where the power to issue the bonds was fully vested in the corporation*, the proposition can not be sustained"

In Lynde vs. the county, 16 Wall., 6, there was in fact no election held on "The question, whether money may be borrowed." Yet the court (pg. 13) in effect say, that if in fact no election had been held, the bonds containing recitals implying a conformity to the statute, are unimpeachable in the hands of a *bona fide* holder.

In Humboldt Towns. vs. Long, 2 Otto, 645, the court say:

"The election was a step in the process of execution of the power granted to issue bonds in payment of a municipal subscription to the stock of a railroad company. *it did not itself confer the power*"

The case of Commissioners vs Thayer, 4 Otto, 631, is in perfect accord with the foregoing authorities. The bond in that case contained no recital that an election had been held. So it was open to the defense that no election, which "was a step in the process of execution of the power granted to issue bonds," had ever been held. Therefore, when the Kansas court found the affirmative fact, that "a majority of the electors cast their vote *against the proposition* to issue bonds, the entire foundation of the proceedings is gone." For the condition precedent manifestly had not been performed, and there being no recital in the bond to the contrary, to constitute an estoppel, the negative vote completely restricted the right of the court to execute the legislative power, and interdicted, if it did not subvert, its "jurisdiction to proceed further in the matter."

III.

ESTOPPEL.

Even though the existence of an election could be held to be a jurisdictional fact, this would not prevent the operation of an estoppel, found both upon the face of the bond in question, and *en pais*. For the estoppel is a preclusion in law, which prevents a party from alleging or denying a fact in consequence of his previous act, allegation or denial of a contrary tenor.

Stephens' Pleading, 197.
Bonner vs. Wilkerson, 5 Barn. & Ald,. 682.
Baker vs. Dewey, 1st Barn. & Cres., 704.

It is a plea which neither admits nor denies the facts alleged, but denies the legal right of the pleader to allege them.

Gould's Pleading, ch. 2, Sec. 39.
Taunton, J., in Bowman vs. Taylor.

2 Ad. & E., 278, says:

"The law of estoppel is not so unjust or absurd as it has been too much the custom to represent. The principle is that when a man has entered into a solemn engagement by deed (and equally so by bond) under his hand and seal, as to certain facts, *he shall not be permitted to deny any matter which he has so asserted.*"

If there is any principle of law definitively and firmly settled by often repeated *dicta* of the judges, and cumulative adjudications of the Supreme Court of the United States, it is this: Where the occurrence of any act—such as the vote of the electors—is a condition precedent to the exercise of the power of subscription by a county court or municipal corporation, and certain officers thereof, entrusted with the duty of ordering such election and determining its result, certify in the bonds issued that such condition has been complied with, the bonds, in the hands of a *bona fide* purchaser, are not subject to the defence that such election was not in fact held.

Knox Co. vs. Aspinwall, 21 How., 544.
Moran vs. Miami Co., 2 Black, 732.
Mercer Co. vs. Hackett, 1 Wall., 83.
Supervisors vs. Schenck, 5 Wall., 784.
Meyer vs. Muscatine, 1 Wall., 384.
City of Lexington vs. Butler, 14 Wall., 283.

This is especially the case where the fact, upon the happening of which the court or officers are authorized to issue the bonds, is one peculiarly within the knowledge of the persons to whom the power to issue has been conditionally granted.

Morey vs. Towns'p of Oswego, 2 Otto, 639.
Ibid, 642, 643.
Humboldt Towns'p vs. Long et al.

In this latter case the bond merely recited that it was issued in pursuance, &c., of the act, and that was held sufficient and conclusive on the county.

This point was carefully and fully investigated and settled in Town of Coloma vs. Eaves, 2 Otto, 484. And we submit that the case at bar is equally as strong, if not stronger for the respondent, both in the recitals of the bonds and the extrinsic merits. There the empowering act, after requiring preliminary notices of the election, provided that:

"If it shall appear that a *majority of all the legal voters* * * * voting at such election, have voted for subscription."

This is in effect the requirement of the Missouri legislative and constitutional provision.

Viewed in their relation to the state of the law under which they were issued, the bonds in that case and the one at the bar, in the operative words of their recitals, are remarkably similar. Both recite that they were issued *under* the law. The language of the Ray county bond being, if anything, more explicit and comprehensive in that it says, *under* the *authority* of the constitution and the laws of the General Assembly of the State.

The case at bar is stronger too than that of Humboldt vs. Long, *supra*, for there the bond did not recite in terms that any election was held; while in the case here the bond declares that it was *autho ized* by a vote of the people of the county at a special election held for that purpose.

What was the manifest object of these recitals but to convey to the public and purchasers the idea and belief, that the issue and circulation of these bonds had all the sanctions of the constitution and laws of the State, and the consent of the people of the county? For this

county, after these recitals, have accomplished their mission in obtaining the money of innocent purchasers, and securing to the county the fruit of their negotiation for a period of six years, to say that these recitals are false, or do not mean what they say, were a mockery of justice —an indefensible wrong.

"If upon a true construction of the legislative enactment conferring the authority (to wit: to issue municipal bonds upon certain conditions), the corporation or certain officers, or a given body or tribunal, are invested with power to decide whether the condition precedent has been complied with, then it may well be that their determination of a matter *en pais* which they are authorized to decide, will, in favor of the bondholder for value, bind the corporation."

Dillon on Mun. Cor. (2d Ed.), § 419.

"The bonds recited that they were issued by authority of the common council, and that three-fourths of the legal voters had petitioned for the same, required by the charter. In a suit subsequently brought by an innocent holder for value, to recover the amount of unpaid coupons for interest, it was held inadmissible for the defendants to show that three-fourths of the legal voters of the city had not signed the petition for the stock subscription."

Idem.

See also—Bissell vs. Jeffersonville, 24 How., 287.
Van Hostrop vs. Madison City, 1 Wall., 291.
Mercer County vs. Hacket, 1 Wall., 83.
Meyer vs. Muscatine, 1 Wall., 384.
Knox County vs Aspinwall, 21 How., 544.
Town of Venice vs. Murdock, 2 Otto, 494.

"Power to issue bonds to aid in the construction of a railroad is frequently conferred upon a municipality in a special manner, or subject to certain regulations, conditions or qualifications; but if it appears by their recitals that the bonds were issued in conformity with these regulations, and pursuant to those conditions and qualifications, proof that any or all these recitals were incorrect will not constitute a defense for the corporation in a suit on the bonds or coupons, if it appears that it was the sole province of the municipal officers who executed the bonds to decide whether or not there had been an antecedent compliance with the regulation, condition or qualification, which, it is alleged, was not fulfilled."

St. Joseph Township vs. Rogers, 16 Wall., 644
Dillon Mun. Cor, § 419.
Comm'rs. &c. vs. Nichols, 14, N. S. 260.

Society, &c., vs. New London, 29 Conn., 174.

Railroad Company vs. Evansville, 14 Ind , 395.

"There is nothing in the case of Marsh vs. Fulton County, 10 Wall., 676, at all inconsistent with the rule thus asserted. In that case there were *no* recitals in the bonds, and there was no decision that the conditions precedent to a subscription, or to the gift of authority to subscribe, had been performed"

Colloma vs. Eaves, 2 Otto, 484.

Even the dissenting opinion in the foregoing case admits the doctrine in its broad sense:

"If, when the law requires a vote of taxpayers, before bonds can be issued, the supervisor of a township, or the judge of probate of a county, or other officer or magistrate, is the officer designated to ascertain whether such vote has been given, and is also the proper officer to execute, and who does execute bonds; and if the bonds themselves contain a statement or recital that such vote has been given, then the *bona fide* purchaser of the bonds need go no further. He has a right to rely on the statement as a determination of the question. But a mere execution and issue of the bonds without such recital is not in my judgment conclusive."

Justice Bradley's opinion in Colloma vs. Eaves.

In Moran vs. Miami county, 2 Black, 722, the court say:

"We think and adjudge that the recitals in the bonds are conclusive (of compliance with the precedent conditions), constituting an estoppel *en pais* upon the defendant in this suit."

To the same effect see Marcy vs. Oswego township, 2 Otto, 637, and Humboldt vs. Long, *idem*, 642. In the latter case the court say:

"The board of county commissioners, who caused the bonds to be issued, were constituted the authority to determine whether the conditions of fact made by the statute precedent to the exercise of the authority granted to execute and issue the bonds had been performed, and their recital in the bonds issued by them is conclusive in a suit against the township brought by a *bona fide* holder."

In Humboldt township vs. Long, the court say:

"Whatever may be the right of the township as against those who issued the bonds, it cannot be set up against a *bona fide* holder of the bonds, that the amount issued was too large, in the face of the decision of the board and their recital that the bonds were issued pursuant to and in accordance with the act of 1870."

To the same effect, see county of Moultrie vs. Savings Bank, 2 Otto, 631, where the court say:

"After having assured a purchaser that the subscription was made in December, 1869, when they had power to make it, it would be tolerating a fraud to permit the county to set up, when called upon for payment, that it was not made until after July 2d, 1870, when their authority expired."

See also—Concord vs. Portsmouth Savings Bank, 2 Otto, 625.

Grand Chute vs. Winegar, 15 Wall., 355.

Lynde vs. Winnebago Co, 16 Wall, 6.

Railroad Co. vs. Otoe county, 16 Wall. 667.

Kennicut vs. Supervisors, 16 Wall., 464

Chambers Co vs. Clews, 21 Wall., 317

The course of decisions by the Supreme Court of Missouri up to the period when the bonds of Ray county were issued, uniformly sustained the validity of such bonds in the hands of innocent purchasers:

"When a county, acting under an authority it supposed to be valid, subscribed to the stock of a company in good faith, issued its coupon notes in payment of such subscription, and for a series of years voted the stock, and paid its coupons, and such notes passed into the hands of innocent and *bona fide* purchasers, it is *estopped* from asserting that such notes were illegally issued."

Hannibal & St Joe R R Co vs. Marion Co., 36 Mo., 294 (1865.)

"We hold the bondholders to a knowledge of all that is contained in the act of the general assembly, but (in the absence of actual notice) do not hold them bound to enquire whether an election had been held as to the making of the subscription of stock, or as to the regularity of such an election, or the qualifications of the voters thereat"

Flagg vs. Palmyra, 33 Mo., 440. (1863.)

Where there were defects in the election and subscription, but the county received the stock and voted it, the purchaser is warranted "in assuming that such election, if required by law, had been duly held, and that the condition to the subscription had either been complied with or waived."

Barrett vs. County Court, 44 Mo, 197. (1869)

"The purchaser has a right to trust to the decision of the proper authorities, made when the bonds were issued, as to the regularity of the proceedings" Otherwise "the injustice to one who has received them, trusting to the truth of the recitals, would be very great"

Neal vs. Saline County Court, 48 Mo., 390 (1871.)

The case of Steins vs. Franklin Co., 48 Mo, 187, was decided in

1871, and subsequent to the issue of the Ray county bonds; and so was th ecase of Carpenter vs the town of Lathrop, 51 Mo., 483, which was decided in the year 1873 .

The case of the St. Joe & Denver R. R. Co. vs. Buchanan county was not one in which the rights of an innocent purchaser of commercial paper were involved, and in the two former cases, it does not appear that the recitals in the bonds were such as to operate as an estoppel against the municipality issuing them.

In the case of Smith vs. Clark county, 54 Mo., 58, the earlier doctrine of the court was reaffirmed in an able and exhaustive opinion, in which the court say that where bonds have been issued, and it has been supposed by all parties that the law has been complied with, the bonds on their face showing a compliance, "strangers should not be required to look further."

IV.

ESTOPPEL EN PAIS

If ever there was a party that should be estopped its obligation to pay its bonds, it is Ray county. I on the face of this entire transaction, and its surrou that the county most sorely needed and anxiously soug tended through it, and particularly its county seat, a rail populous, and progressive community they were an abreast of the neighbor counties in all the external tional prosperity, and in the increased facilities for c course and productive development. As early as 1859 the Missouri River Valley railroad company was incorporated, designed to run through this county (Vide pg 16, printed record.)

The county, by this act, was authorized to subscribe to the capital stock of this company On the 13th day of August, 1860, the people of the county, at an election held for that purpose, voted a subscription to this company of two thousand shares of stock, of one hundred dollars ($100 00) each, in payment of which the county court was authorized to issue the bonds of the county. In 1864 the legislature passed an act, *inter alia*, for the extension and completion of the

North Missouri Railroad company to the Iowa State line, etc. The 12th section of this act, in the nature of an enabling act, authorized the Chariton and Randolph Railroad company, and the said Missouri Valley Railroad company, by a majority vote of their stockholders, to transfer to the North Missouri Railroad company all their assets, rights, privileges and the work done on these respective roads. After which the Missouri Valley Railroad company was to merge into the North Missouri Railroad company. This was accepted by the latter company, and in April, 1864, the Missouri Valley Railroad company made this transfer.

Ray county having subscribed the stock aforesaid, and being represented by its agent in the last named company as a stockholder.

On February 16th, 1865, the legislature passed another act for the completion of the North Missouri Railroad and its west branch. This was also accepted. The 14th section thereof provided for the location and building of the west branch through said county and the town of Richmond.

On the 13th of December, 1866, a contract was accordingly made between the N. Mo R. R Co and the county court of Ray county, by which the company, in consideration of $150,000 of the bonds aforesaid, was to build to the town of Richmond the said West branch, to be known as "a spur" of said West branch. All this was approved and ratified by the proper orders of the county court, which afterwards appointed its agents and was represented as such stockholder in the N Mo. R. R. Co

The St Louis & St Joseph R. R. Co. having been chartered in January, 1868 (vide pg. 27 printed record), the said county court on the 19th day of May, 1868, made another order (beginning on pg 29 of printed record), which recited, *inter alia* that the N. Mo. R. R Co. proposed to release the county from its subscription to it, on condition that the company should be released from the contract to build said spur, and that the county should subscribe two hundred and fifty thouand dollars ($250,000) to the St. L & St Joe R R Co. for building its road, not only over the same route, but through the entire county.

This the county court declined, but in lieu thereof, upon the petition of 1,200 or 1,400 citizens of the county, requesting that said two hundred thousand dollars ($200,000) "be applied to the purpose and object of constructing a railroad from the West branch of the N Mo R. R. through the city of Richmond, in said county, *to St. Joseph*," made its order accordingly. The said order provided for the payments of said subscription in installments of $50,000 upon the doing by the said St. L. & St. Joe R. R. Co. of a given amount of work. This contract was accepted and duly ratified by all the parties concerned.

The orders of the county court show that the terms of this contract were strictly complied with by the St. L. & St. Joe R. R. Co. And before the last $50,000 was delivered, the court, by an *addendum* to the contract, required the company to establish additional depots in said county. This the company complied with. As a result of all which the said county got between 26 and 28 miles of railroad built through its southern boundary by the N. Mo. R. R. Co., and twenty-eight (28) miles of road, built by the St. L. & St. Joe R. R. Co., passing through its center and its capital town, with numerous depots established at convenient points for the accommodation of its citizens; which said roads have ever since been in active operation and use in said county, and bearing their proportion of the burdens of county taxation. Nor is this all: The county court appointed an agent to represent it as a stockholder in said company, though the agent does not appear to have acted. But the county received the certificate of stock as a stockholder in the St. L. & St. Joe R. R. Co., for the two hundred thousand dollars ($200,000) subscribed, and has held the same for seven years, and has never offered even to surrender the same. Nor is this all: The county has levied and collected a tax for the years 1869, 1870, 1871, 1872 and 1873 to pay the interest on these bonds, and has actually paid the same.

During all this time the people of this county have stood by and seen this road built in their midst, out of the very money realized on the sale of the county's bonds; held the certificate of the company's stock; paid their taxes for five years to meet the interest; have used, enjoyed and exulted over their miles of railroad; and now when asked

to continue to pay this interest, they catch the contagion of the spirit of resistance to this class of debts, which recently broke out like an epidemic in the State, and discover that they never voted for a subscription to the St. L. & St. Joe R. R. Co., although they voted it to another company which offered them a less number of miles of railroad and fewer accommodations.

By every inspiration of justice, morality and public faith, this county is estopped from making such a defense.

"*Omnis ratihabitio retrotrahitur et mandato priori æqui-paratur.*"

Amy vs. Pendleton county, 13 Wall., 305.

Superintendent vs. Schenck, 5 Wall., 781, 782, 783.

PHILIPS & VEST AND J. B. HENDERSON,

For Respondent.

Afferic —

On 29 1877
submitted

6 Otto 1 689

Oct. 1 1877

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 700.

PHILEMON B. HAWKINS, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

(25)

FILED MAY 29, 1877.

Nov 3 1877

Jno Gibson

SUPREME COURT OF THE UNITED STATES.

No. 700.

PHILEMON B. HAWKINS, APPELLANT,

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1 In the United States Court of Claims.

PHILEMON B. HAWKINS
vs.
THE UNITED STATES.
} No. 10,706.—Filed Oct. 11, 1875.—J. R.

The petition of Philemon B. Hawkins, a citizen of the State of North Carolina, respectfully shows:

First. That on the 15th day of May, 1874, he entered into a contract with the United States, whereby he agreed to furnish one thousand cubic yards (more or less) of rubble-stone for the United States, at Raleigh, for the court-house and post-office building in said city, at and for the sum of $5 per cubic yard. Said stone was to be equal to a sample submitted by the plaintiff at the time he made his proposal, and was to be of sizes described in the contract. The stone was to be delivered at such times and in such quantities as might be deemed necessary by the superintendent of the
2 said building. A copy of said contract is hereto annexed, marked Exhibit "A," and referred to as a part of this petition.

Second. The plaintiff immediately made his arrangements to fulfill his agreement, and at great expense began to quarry and ship stone to Raleigh, of the character required by the terms of the contract and like the sample exhibited by him, and to deliver the same at the site of the said building. After he had delivered at the site of said building a large quantity of rubble-stone of the kind required by the contract, the officers of the United States refused to accept the same, and he was by the said officers of the United States in charge of said building directed and required to remove the stone so delivered, and was by them directed to quarry and deliver, in lieu of rubble-stone, what is known as dimension-stone, the latter being a much larger and more expensive kind of stone.

Third. In obedience to said directions the plaintiff immediately removed the rubble-stone from the building and
3 proceeded to quarry and deliver, in lieu thereof, at the site of said buildings, large quantities of dimension-stone; and on or before the 20th day of December, 1874, the plaintiff delivered at the site of said building, in the city of Raleigh, seven hundred and sixty-seven (767) cubic yards of dimension-stone, all of which were accepted by the United States, and were used in the construction of said building. The dimension-stone so delivered by the plaintiff was reasonably worth the sum of $12.50 per cubic yard.

Fourth. At the time the plaintiff was ordered to remove the rubble-stone and deliver dimension-stone instead thereof, he had delivered at the site of said building fifty cubic yards of rubble-stone, and had quarried and prepared ready for shipment two hundred and thirty (230) cubic yards.

Fifth. The United States have paid the plaintiff, on ac-
4 count of said stone so delivered, the sum of $3,865.

Sixth. The rubble-stone removed from the site of the building, and that in the quarry ready for shipment, was worth the sum of $330, and not more.

The plaintiff, therefore, prays judgment against the United States for the sum of $6,447, according to the following specification of items, that is to say:

1. For 767 cubic yards of dimension-stone, at $12.50 per cubic yard		$9,587 00
2. For fifty cubic yards of rubble-stone, at $5 per cubic yard		250 00
3. For quarrying 230 cubic feet of rubble-stone (not shipped), at $3.50 per cubic yard		805 00
		$10,642 00
The United States are entitled to credit for cash	$3,865 00	
For value of rubble-stone removed from yard and that in quarry not shipped	330 00	
		4,195 00
Balance due		$6,447 00

Seventh. The petitioner has applied to the proper officer of
5 the United States Treasury Department for payment of his said claim, but said officers allowed him only a small part thereof, which he refused to accept.

PHILEMON B. HAWKINS,
Louisburg P. O.,
Franklin Co., N. C.

ENOCH TOTTEN,
Solicitor for Plaintiff,
Washington, D. C.

STATE OF NORTH CAROLINA, }
COUNTY OF WAKE. } *ss.*

I, Philemon B. Hawkins, being first duly sworn, do depose and say, that I have read the foregoing petition by me subscribed, and that no assignment or transfer of said claim, or any part thereof, has ever been made; that I am the sole owner thereof, and that I am justly entitled to the amount claimed in said petition from the United States, after allowing all just credits and offsets, and I believe the facts stated in said petition are true.

PHILEMON B. HAWKINS.

Subscribed and sworn to before me, this 8th day of October, 1875, by Philemon B. Hawkins.

CHAS. ROOT, *Notary Public.*

6 *Exhibit A.*

Contract between the United States of America and Philemon B. Hawkins, of Louisburg, N. C.

This contract made and entered into by and between William A. Hearne, superintendent of the construction of the U. S. court-house and post-office at Raleigh, N. C., for and in behalf of the United States of America, of the first part, and Philemon B. Hawkins, a resident of Louisburg, Franklin county, North Carolina, to whom was awarded the contract for furnishing and delivering on the site of the U. S. court-house and post-office at Raleigh one thousand (1,000) cubic yards (more or less) of rubble-stone, on his bid for the same, received under advertisement dated July 21, A. D. 1873, of the second part, witnesseth:

That the party of the second part covenants and agrees to and with the party of the first part to furnish and deliver on the site of the court-house and post-office at Raleigh, N. C., one thous-
7 and (1,000) cubic yards (more or less) of rubble-stone, said stone to be in every way equal to the sample furnished with his bid, one-quarter to be bond-stones of a length equal to the thickness of the walls and to contain not less than ten (10) cubic feet, and no stone to contain less than one and one-half ($1\frac{1}{2}$) cubic feet or to be less than twelve (12) inches thick, and said stone to be delivered at such times and in such quantities as may be deemed necessary by the superintendent, and in full accordance with the advertisement and proposal hereto attached and forming a part of this contract.

And the said party of the first part, acting for and in behalf of the United States, doth covenant, promise, and agree to pay or cause to be paid unto the said party of the second part, or to his heirs, executors, administrators, or assigns, in lawful money of the United States, the sum of five dollars ($5.00) per cubic yard; the stone to be measured in the wall, net measurement only to be allowed. Payments to be made in the following manner, viz:

Ninety per cent. (nine-tenths) of the value of the stone delivered on the site of the building will be paid from time to time in
8 monthly payments as the work progresses, (the said value to be ascertained by the superintendent,) and ten per cent. thereof (one-tenth) will be retained until the completion of the contract and the approval and acceptance of the same by the superintendent, which amount shall be forfeited by said party of the second part in the event of the non-fulfillment of this contract to the entire satisfaction of said superintendent.

It is further covenanted and agreed by and between the parties of this contract, that if, from any cause whatever, the said party of the second part should fail in required promptness in the delivery of the said stone by or within the time or times specified above, it shall become the duty of the said superintendent, and he shall be, and hereby is, authorized and empowered, after eight days due no-

tice thereof, in writing, served personally upon, or left at the shop, office, or usual place of abode of the said party of the second part, or with his agent, without effect, to purchase and supply any deficiency of stone caused by the delinquency of the said party of the second part, and the actual cost thereof, together with fifteen
9 per cent. thereon, shall be deducted from any moneys due or owing to the said party of the second part on account of this contract; and if that amount be not due him, then his bondsmen are to be held liable for any deficiency, to be recovered of them by suit in the name of the United States: or the said party of first part may elect that if the party of the second part should fail to complete the said contract by or within the time or times specified above, that he shall forfeit the sum of fifty ($50) dollars per diem for each and every day thereafter until the final completion of the contract, which sum shall be deducted from any moneys which may be due him; and if that amount be not due him, then his bondsmen are to be held liable for any deficiency, to be recovered of them by suit in the name of the United States.

It is further covenanted and agreed between the parties to this contract, that the party of the second part shall execute, with two or more good and sufficient sureties, a bond to the United States in the sum of one thousand ($1,000) dollars conditioned for the faithful performance of this contract, and the agreements and covenants herein made by the said party of the second part.

10 It is also covenanted and understood that no member of Congress, or other person whose name is not at this time disclosed, shall be admitted to any interest in this contract; and it is further covenanted and agreed that this contract shall not be assigned except by consent of the Secretary of the Treasury; and that any assignment thereof, except as aforesaid, will be a forfeiture of the same.

It is further covenanted and agreed by and between the parties hereto, that this contract shall be valid and binding when approved by the Secretary of the Treasury, and not otherwise, and no departure from its conditions shall be made without his written consent.

In witness whereof, the parties hereto have hereunto subscribed their names and affixed their seals, this 15th day of May, A. D. 1874.

WM. A. HEARNE.

Witnesses to the signature of the superintendent:

JOHN STELMAN,
THEO. N. RAMSAY.

PHILEMON B. HAWKINS.

Witnesses to the signature of the contractor:

J. J. SAWYER,

11 In the Court of Claims of the United States.

PHILEMON B. HAWKINS
vs.
THE UNITED STATES. } No. 10,706.—December Term, A. D. 1874.

And now comes the attorney-general, on behalf the United States, and makes answer to the petition of the claimant herein, and, not confessing the same, or any part thereof, denies each and every allegation therein contained, and calls for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the United States are indebted to the said claimant in the sum of six thousand four hundred and forty-seven dollars, says that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said government, denies the said allegation.

THOMAS SIMONS,
Assistant Attorney-General.

Filed October 21, 1875.

12 United States Court of Claims.

PHILEMON B. HAWKINS
vs.
THE UNITED STATES. } No. 10,706.

And now comes the said plaintiff and moves the court for leave to amend his original petition herein, as follows, to wit:

1. By striking out the words and figures "seven hundred and sixty-seven (767)" wherever they appear therein, and substituting in lieu thereof the words "nine hundred and sixty-five (965)."

2. By claiming judgment for $8,962.50 and by changing the specifications of the items of his claim so as to read as follows:

For 965 cubic yards of stone, @ $12.50		$12,062 50
For 50 cubic yards of rubble-stone delivered, @ $5		250 00
For 230 cubic yards rubble-stone prepared for delivery but not shipped, @ $3.50		805 00
		$13,117 50
Credits.		
For cash	$3,825 00	
For value of rubble-stone rejected and in quarry not shipped	330 00	
		$4,155 00
Balance due		$8,962 50

13 ENOCH TOTTEN,
Attorney for Plff.

Filed and allowed December 29, 1876.

In the Court of Claims.

PHILEMON B. HAWKINS
vs.
THE UNITED STATES. } No. 10,706.

At a Court of Claims held at the Capitol, in the city of Washington, the 12th day of February, A. D. 1877, judgment was ordered up as follows:

The court, upon due consideration of the premises, find in favor of the claimant, and do order, adjudge, and decree, that the said Philemon B. Hawkins, claimant, do have and recover of and from the United States the sum of one thousand five hundred and sixty-six dollars and ninety-five cents ($1,566.95).

BY THE COURT.

A true copy of record.

14 In the Court of Claims.

PHILEMON B. HAWKINS
vs.
THE UNITED STATES.

And now comes the said plaintiff and appeals to the Supreme Court of the United States from the judgment rendered in the above-entitled cause, and prays that his said appeal may be allowed.

ENOCH TOTTEN,
Atty. for Plaintiff.

Filed March 13, 1877.

Ordered, That the appeal be allowed as prayed for.

BY THE COURT.

15 Court of Claims.

PHILEMON B. HAWKINS
vs.
THE UNITED STATES.

Findings of fact by the Court.

1. The contract, a copy of which is annexed to the claimant's petition, was duly entered into by the parties, as therein set forth.

2. In May, 1874, the claimant began to deliver rubble-stone, and had delivered fifty cubic yards of such as came within the description and standard of the smaller-sized stone required by the contract, when Mr. D. B. Thomas, the assistant superintendent of the work, in immediate charge thereof for the defendants, rejected these stone, refused to receive any of the same description, and informed the claimant of the kind which must be furnished to make such a wall as he wanted, and which was, in fact, a ranged-rubble

or broken-ashlar stone of a more expensive kind than that called for by the contract, and which would make a wall superior in appearance to that contemplated by the specifications. At this time the claimant had quarried and ready for transportation and delivery 230 cubic yards more of rubble-stone, the quarrying
16 of which was worth $805.

3. The claimant, while maintaining that he thought the stone he had delivered was up to the contract, expressed a willingness and desire to furnish such material as would give perfect satisfaction to the government and its agents. Thereupon he got out, and at different times, almost weekly, between June 1 and November, 1874, delivered in all 958¾ cubic yards of ranged-rubble or broken-ashlar stone, different from that called for by the contract, and worth $12.50 per cubic yard as delivered. These stone were cut, trimmed, and squared by defendants' workmen, so as to fit them for such a wall as said Thomas desired to make, and thereby lost one-fourth part in measurement, and in the wall measured only 767 cubic yards.

4. From time to time said claimant, in the presence of said assistant superintendent and of the superintendent, asserted that he was required to furnish a superior stone to that required by the contract. In August, 1874, one Mr. Oakshot was sent by the supervising architect of the Treasury Department to examine the work and put the superintendents right on it. The claim-
17 ant then, in presence of said Oakshot, and of the superintendent and assistant superintendent, protested that he was required to furnish stone superior to that required by the contract, and announced his intention to make claim for extra allowance. Mr. Oakshot compared the work done with the plans and specifications, pronounced it superior to that contemplated, being, he said, in fact, ranged-rubble or broken-ashlar walls, but suggested that it would perhaps be necessary then to complete the work as begun. Subsequently Mr. Oakshot officially visited the work several times, once in company with the supervising architect, and always referred to the foundation-walls as being of a superior class of work, to which fact he called the attention of the supervising architect, and to which that officer assented.

5. The market value of the 50 yards of rubble-stone rejected, and of the 230 yards quarried and not received by the defendants, as set forth in the second finding, was $456.80.

6. Four payments were made to the claimants, amount-
18 ing in all to $3,825, upon vouchers made out upon estimates, generally in excess of the work actually done at the time, copies of which said vouchers, with the certificate of the superintendent thereto, and the receipts of the claimant, are as follows: "The stone was designated therein by the superintendent as 'rubble-stone' because he had no room for any other designation under the specifications."

The United States to Philemon B. Hawkins, DR.

On account of the appropriation for construction of the U. S. c. h. and post-office at Raleigh, N. C.

Date.	Designation.	Application.	Amount.
1874.			Dolls. Cts.
June 3.	To three hundred (300) cubic yard rubble-stone, @ $5 per cubic yard.	Construction of the U. S. court-house and post-office at Raleigh, N. C.	1,500 00
		Less 10 per cent.....	150 00
			1,350 00

I certify that the articles above enumerated have been received and the services performed; that they were necessary for, and have been or will be applied to, the construction of the U. S. c. h. and p. office at Raleigh, N. C., and that the prices paid were just and reasonable. WM. H. HEARNE, *Superintendent.*

19 Received, Raleigh, this 4th day of June, 1874, from John C. Blake, disb'g agent, the sum of thirteen hundred and fifty dollars, in full payment of the above account. $1,350.

(Signed in duplicate.) PHILEMON B. HAWKINS.

Paid by check on Ral. Nat. Bank, No. 41, dated June 4, 1874.

The United States to Philemon B. Hawkins, DR.

On account of the appropriation for construction of the U. S. court-house and p. o., Raleigh, N. C.

Date.	Designation.	Application.	Amount.
1874.			Dolls. Cts.
July 1.	To two hundred cubic yds. of rubble-stone, @ $5 per cubic yard. Contract of 15 May, 1874.	Construction of U. S. court-house and p. o.	1,000 00
		Less 10 per ct. reserved.	100 00
			900 00

I certify that the articles above enumerated have been received and the services performed; that they were necessary for,
20 and have been or will be applied to, the construction of the U. S. p. office and ct. ho., Raleigh, N. C., and that the prices paid were just and reasonable.

WM. A. HEARNE, *Superintendent.*

IN THE

United States Supreme Court.

OCTOBER TERM, 1875.

WASHINGTON CITY, D. C.

HORATIO D. VANSYCKLE, } Plaintiff,
AGAINST
RAY COUNTY, } Defendant.

BRIEF of Wm. S. EVERETT,

With whom appears James L. Farris, Attorneys for Defendant.

IN THE

United States Supreme Court.

OCTOBER TERM, 1875.

WASHINGTON CITY, D. C.

HORATIO D. VANSYCKLE, } Plaintiff,
AGAINST
RAY COUNTY, } Defendant.

BRIEF of WM. S. EVERETT,

With whom appears James L. Farris, Attorneys for Defendant.

No. 288. $100.

STATE OF MISSOURI,
RAY COUNTY BOND.

Issued in payment of the Stock of the } *St. Louis and St. Joseph Railroad Company.*

Ten Years.

Know all men by these presents, That the County of Ray, in the State of Missouri, acknowledges itself indebted and firmly bound to the St. Louis and St. Joseph Railroad Company in the sum of *One Hundred Dollars*, which sum the county promises to pay to the said St. Louis and St. Joseph Railroad Company, or bearer, at the American Exchange National Bank,

in the city of New York, in the State of New York, on the *first* day of January, A. D. 1879. Together with the interest thereon from the first day of January, A. D. 1869, at the rate of *eight* per cent. per annum, which interest shall be payable annually on the presentation and delivery at the said bank of the coupons of interest hereto attached. *This Bond* being issued under and pursuant to an order of the County Court of Ray County, made under the authority of the Constitution of the State of Missouri and the Laws of the General Assembly of the State of Missouri, and authorized by a vote of the people of said county at a special election held for that purpose.

In testimony whereof, the said county of Ray has executed this *Bond* by the presiding Justice of the County Court of said county under the order of said Court, signing his name hereto and by [L. S.] the Clerk of said Court under order thereof attesting the same and affixing thereto the seal of said Court. This done at the town of Richmond, county of Ray aforesaid, this second day of November, 1869.

C. W. NARRAMORE,

Presiding Justice of the County Court of Ray County, Missouri.

Attest: GEO. N. MCGEE, *Clerk of the County Court of Ray County, Missouri.*

$8.00 COUPON.

RICHMOND, RAY COUNTY, MISSOURI, November 2d, A. D. 1869.

The county of Ray acknowledges to owe the sum of *Eight Dollars*, payable to bearer on the first day of January, A. D. 1871, at the *American Exchange National Bank* in New York, for one year's interest on *Bond* No. 288.

GEO. N. MCGEE,

Clerk of County Court of Ray County, Mo.

HISTORY OF THE CASE.

This is an action of *assumpsit* brought for the recovery of interest claimed to be due, by divers interst coupons attached to bonds issued by the County Court of Ray County, Missouri, in payment of subscription to the capital stock of the St. Louis and St. Joseph Railroad Company. As a defense, the County interposed a plea that the General Assembly of the State of Missouri, by act approved December 5, 1859, Sessions Acts of 1859–60, page 414 *et seq.*, incorporated the Missouri River Valley Railroad Company. By the 20th section of that act the County Court of any county in which any part of the route of the road might be, was authorized to subscribe to the stock of the company, and invest its funds in the stock of the company, and to raise such funds by tax, to be voted by the legal voters of such county in such manner as such County Court might prescribe, for the purpose of paying such stock; but it did not authorize the issuing of any bonds for such purpose.

But by the third section of a supplemental or amendatory act, approved March 30, 1860, the County Courts respectively of the counties of Randolph, Chariton, Carroll, Ray, Clay and Platte were authorized to issue bonds of their respective counties where they shall have subscribed to or become purchasers and owners of capital stock of the Missouri River Valley Railroad Company, which bonds were to be issued in sums not exceeding one thousand dollars each, having not

exceeding ten years to run to maturity, bearing interest at the rate of eight per cent. per annum, payable annually, *at the county seat of such county, or in the city of St. Louis, as the County Court might prefer.* The bonds thus provided for when so issued and delivered to the company were to be in payment of the stock so subscribed or purchased. See Sessions Acts of called session of 1860, pages 15 and 16, in Sessions Acts of 1859 and 1860.

On the second day of July, 1860, the County Court of Ray County, Missouri, ordered an election by the citizens to be held on the 13th day of August, 1860, at the several places of voting, to determine whether the county of Ray should subscribe or take two hundred thousand dollars of stock in the Missouri River Valley Railroad Company, upon conditions:

First. That all of said county stock should be expended on that part of the railroad in the county of Ray. That said subscription should be payable in county bonds to run ten years, bearing interest at the rate of eight per cent., the interest to be paid annually; and

Second. That no bond should be issued or delivered to the company until provisions should be made for building the said road to the eastern boundary of the county of Ray.

The said election was held on the 13th day of August, 1860, and when the votes came to be canvassed on the 8th day of November, 1860, it appeared that there had been a large majority of the said votes cast in favor of the making of the subscription upon the conditions before mentioned. The said Court thereupon appointed agents to make the subscription and vote the stock so subscribed for and on behalf of the county. This subscription was made, but no bonds were ever issued to the Missouri River Valley Railroad Company.

By the 12th section of an act of the General Assembly of the State of Missouri, approved February 10, 1864, Sessions

Acts adjourned session 1864, page 50 *et seq.*, the Missouri River Valley Railroad Company, by the name of the Missouri Valley Railroad Company, was authorized, by a vote of a majority of their stockholders in interest, to transfer and assign to the North Missouri Railroad Company all of their effects and assets, rights and privileges, under their charter, and all the work that had been done in the construction of their road; and upon such transfer being accepted by the North Missouri Railroad Company, the said Missouri Valley Railroad Company should cease to have a corporate existence, and a new company was in that case to come into existence to be styled and known as the West Branch of the North Missouri Railroad.

On the 4th day of April, 1864, the County Court of Ray County made an appointment of agents to vote for directors of the Missouri River Valley Railroad Company, and at the same time ordered and directed the agents so appointed to vote in the meeting of stockholders of the said Missouri River Valley Railroad in favor of transferring and assigning all of the effects and assets, rights and privileges belonging to the Missouri River Valley Railroad Company under its charter to the North Missouri Railroad Company, under the provisions of the 3d section of the act of February 10, 1864, before referred to.

On the 16th day of July, 1864, the said agents made report to the said County Court (amongst other things), that they had cast the vote of Ray County in favor of the transfer and assignment of the effects, assets, &c., of the Missouri River Valley Railroad Company to the North Missouri Railroad Company, which report was approved by the said court and ordered to be filed and recorded.

On the 18th day of December, 1866, the County Court of Ray County, without any vote of the people or any step being taken to procure or obtain such vote, entered into an agreement in writing, by which the said North Missouri Railroad

Company agreed (amongst other things) to build, run and operate the West Branch of the North Missouri Railroad to the city of Richmond, in Ray County, by a spur of said West Branch, &c.

In consideration of which the County Court of said County of Ray agreed to take one hundred and fifty thousand dollars of the stock of said company, and to issue the bonds of said county to the said company for that amount.

On the said 18th day of December, 1866, the said county court made an order for the issue of the said one hundred and fifty thousand dollars in county bonds in favor of the said North Missouri Railroad Company, but no such bonds were ever issued.

On the 31st day of December, 1867, the St. Louis and St. Joseph Railroad Company was incorporated under the General Incorporation Act, entitled, "Railroad Companies," being chapter 63 of the General Statutes of Missouri.

By the 17th section of this statute, as well as by section 14 of article 11 of the constitution of the State of Missouri, no county court could subscribe to the capital stock of any railroad company unless two-thirds of the qualified voters of such county should give their assent to such subscription at a general or special election.

By the 18th section of said General Statutes when any subscription was made by the County Court of any county in accordance with the provisions of the said 17th section, such County Court was authorized to issue bonds of the county or to levy a tax for the purpose of paying the installments of such subscription as might be called in from time to time by the board of directors of such railroad.

It is admitted by plaintiff, as appears of record, that the County Court of Ray County did not in fact, at any time, make any proposition or order by which the question was submitted to a vote of the citizens of Ray County to subscribe to

the capital stock of the St. Louis and St. Joseph Railroad Company, and that there was no election held at which the citizens of Ray County authorized the County Court to subscribe to the capital stock of the said railroad company, and issue bonds in payment of the same in any sum whatever.

And also that the charter of said company contained no provision by which the County Court was authorized to subscribe to the capital stock of said company without a vote of the people.

On the 19th day of May, 1868, the County Court of Ray County, without the consent of two-thirds, or any other number, of the qualified voters of the said county, and without any election, general or special, for that purpose had or held, entered into a pretended agreement or arrangement with the North Missouri Railroad Company by which the said railroad company released the said county of Ray from the subscription (or pretended subscription) made to that company, and the said County Court agreed to release that company from its undertaking to construct a spur or branch of its road to or through the town of Richmond.

The said County Court also undertook to subscribe two hundred thousand dollars to the stock of the St. Louis and St. Joseph Railroad Company, and to issue bonds of the county in payment of such subscription, but on terms entirely different from the terms of the subscription voted by the people of said county to the Missouri River Valley Railroad Company.

In pursuance of that agreement the County Court of Ray County, without the assent of two-thirds, or any other number, of the qualified voters of said county, given or expressed at a general or special election, or in any manner whatever, undertook to take stock in the St. Louis and St. Joseph Railroad Company by a pretended transfer to the latter company of the two hundred thousand dollars of stock which had been

attempted to be carried down by various transfers from the Missouri River Valley Railroad Company.

After this pretended transfer the said County Court, without the assent of the qualified voters of the said county as prescribed by law, issued bonds, including those involved in this suit, to the amount of two hundred thousand dollars, upon which interest was paid during a portion of the time and during the residue of the time payment was refused.

Having given this history of the various acts of the Legislature, and the action of the County Court, which have given rise to the present litigation, and the admissions of plaintiff, we proceed to state, and endeavor to prove the following propositions:

POINTS.

1st. That the County Court of Ray County had no authority to issue the bonds and coupons which are involved in this suit, and that having been issued without authority they are not the bonds or obligations of Ray County.

2d. The bonds contemplated and authorized by section 17 of chapter 63, of the General Statutes are, by section 18 of the same chapter, to be issued only to raise money to meet assessments on the subscription, when made, as such assessments are called in by the company, and bonds in payment of the entire amount of stock subscribed are wholly unauthorized.

3d. That the various acts of the General Assembly, the constitution of the State of Missouri, the records of the County Court, and the other facts and circumstances surrounding these transactions are sufficient to affect the plaintiff with notice of the invalidity of the bonds and coupons.

4th. That the defendant is not estopped or precluded from setting up the invalidity of the bonds, &c., by reason of the payment of interest upon such bonds.

1st. Then as to the question of the authority of the County Court to issue the bonds in controversy.

ARGUMENT AND AUTHORITIES.

A county is a municipal corporation, created for specific purposes, and like other corporations is clothed with such powers, and such only, as are necessary to effectuate the purposes of its creation.

We must start out with, and keep steadily in view, this proposition, namely: That all that a corporation is authorized by its charter, either in express terms or by necessary implication, to do, it may do; beyond that all its acts are illegal and void. Commonwealth vs Erie & North East R. R. Co., 3 Casey, 339. Dillon on Municipal Cor. 102.

A doubtful power in a corporation does not exist. To be doubtful is to be decisive against the power of the corporation. *Ibid.*

By the act of December 5, 1859, incorporating the Missouri River Valley Railroad Company, and the supplement thereto, approved March 30, 1860, the County Court of any county in which any part of the route of the road authorized to be constructed by said charter might be, was authorized to subscribe to the stock of that company, or to invest its funds in said stock and to raise the funds to pay such subscription or purchase by a tax, or the County Courts of Randolph, Chariton, Carroll, Ray, Clay and Platte counties, respectively, were anthorized to issue the bonds of such counties in payment of stock where *a previous subscription or purchase* had been made.

But before such subscription could be made, or tax levied, or bonds issued, such subscription and tax had "to be voted by the legal voters of such county, in such manner as such County Court may prescribe." It was further provided in the said supplemental act that the bonds to be issued thereunder were to bear interest at the rate of eight per cent. per annum, "payable annually *at the county seat of such county, or in the city of St. Louis*, as the County Court may prefer."

Under the provisions of the act of 1859, incorporating the Missouri River Valley Railroad Company, the County Court of Ray county, on the 2d day of July, 1860, made and entered of record an order for an election by the citizens, to be held in the several election districts of the county, on the 13th day of August, 1860, for the purpose of determining the question whether or not a subscription of two hundred thousand dollars should be made to the capital stock of that company. The order of the Court prescribed the terms and conditions upon which the said question was to be submitted to the vote of the citizens, and the subscription made, if made at all.

By the terms of this act of 1859, it will be seen that a simple majority of the qualified voters actually voting at any such election was sufficient to warrant the making of the subscription; and in this it differed entirely from the laws in force at the time the bonds now in controversy were issued, as we will see presently.

The election thus ordered was held, the votes were canvassed, by which it appeared that a majority of the votes cast were given in favor of the subscription; and the subscription was subsequently made to the capital stock of "The Missouri River Valley Railroad Company."

No bonds were ever issued, however, by the County Court of Ray County to the Missouri River Valley Railroad Company in payment of this stock, because the said company wholly failed to comply with the terms and conditions upon which that subscription was made.

In 1864 the Missouri River Valley Railroad Company and the County Court of Ray County undertook to transfer the stock which

had been regularly subscribed in that company to the North Missouri Railroad Company, under color of the provisions of an act of the General Assembly, approved the 10th of February, 1864, authorizing "The Missouri Valley Railroad Company," by a vote of its stockholders, to transfer its effects, etc., to the North Missouri Railroad Company. This attempt was made by the railroad company and the County Court without submitting the question to a vote of the citizens of the county, as appears by the records of the said Court, and was, therefore, as we say, without authority, and void. Indeed, if it were necessary to stop here to argue that question, it might well be regarded as more than doubtful whether the act of February 10, 1864, was applicable to the Missouri River Valley Railroad Company at all.

The company that was authorized by that act to transfer its assets, effects, etc., to the North Missouri Railroad Company, was "The Missouri Valley Railroad Company."

Now, there were two companies incorporated by the Legislature: "The Missouri Valley Railroad," incorporated in 1857, and "The Missouri River Valley Railroad Company," incorporated in 1859. The subscription authorized by the vote of the citizens, and made by the County Court of Ray County, was to the Missouri River Valley, while, as we have already seen, the company that was authorized by the act of February 10, 1864, to transfer its assets, effects, etc., was the Missouri Valley Railroad Company.

But whether the Missouri River Valley Company had authority under that act to make such transfer or not, is perhaps not of so much importance in this case, for the reason that even if it had such authority, and if the action of that company and the County Court were not a nullity, still such authority was fully exhausted when the transfer was made to the North Missouri Company, and there being no authority found either in the charter of the North Missouri Railroad Company or in any other legislative act for the transfer or consolidation of the stock, effects or assets of that company, or any part thereof, to or with any other, such transfer or consolidation could not be made.

Hence, when the North Missouri Railroad Company and the County Court of Ray County undertook to transfer the stock authorized by the vote of the citizens, and subscribed by the County Court of Ray County, in the Missouri River Valley Railroad Company, mediately or immediately to the St. Louis and St. Joseph Railroad Company, such attempt, whether we regard it as a transfer to, or a consolidation with, the latter company, was without authority, and therefore utterly void. At most, it can have no other or greater effect than a new subscription made, or attempted to be made by the County Court of Ray County to the capital stock of the St. Louis and St. Joseph Railroad Company.

But as a subscription to the stock of that company, it was void and of no effect whatever, because that at the time the St. Louis and St. Joseph Railroad Company was incorporated, as well as at the time the pretended transfer was made, the prohibition contained in the 14th section of the eleventh article of the Constitution of the State of Missouri, and the 17th section of chapter 63 of the General Statutes of Missouri "of railroad companies" was in full force.

By section 14 of article eleven of the Constitution of Missouri, it is provided as follows: "The General Assembly shall not authorize any county, city or town to become a stockholder in, or to loan its credit to, any company, association or corporation unless two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent thereto."

And by section 17 of chapter sixty-three of the General Statutes, it is provided as follows: "It shall be lawful for the county court of any county, the city council of any city, or the trustees of any incorporated town, to take stock for such county, city or town in, or loan the credit thereof to, any railroad company duly organized under this or any other law of the State: *Provided*, That two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent to such subscription."

Thus it will be seen that by the fundamental law of the State, as well as by the very statute under which the St. Louis and St.

Joseph Railroad Company has its being, no subscription to that company could be made by any county court until such subscription had been authorized by a vote of the citizens of the county; and that not merely by a majority of those voting, but by *two-thirds of the qualified voters of the county* voting in favor of it.

But there was no election held, general or special, at which the qualified voters of Ray County had an opportunity of making known their will upon the subject of a subscription to the stock of the St. Louis and St. Joseph Railroad Company.

True, an election was specially called and held in the summer of 1860, at which a majority of the citizens voting decided in favor of a subscription to the capital stock of the Missouri River Valley Railroad Company, which would have fully authorized the making of the subscription and the issuing of bonds in payment of it to that company. But that election was wholly void, for the purpose either of conferring authority upon the County Court to transfer the subscription made to the Missouri River Valley Company to the St. Louis and St. Joseph Company, or of making a new subscription to the latter company.

If the action of the County Court was intended as a transfer of the subscription from one company to the other, then it was without authority and void, as is determined by the Supreme Court of the United States in the case of Marsh vs. Fulton County, 10 Wallace, 676.

There, where in February, 1853, the Mississippi and Wabash Railroad Company was incorporated by the Legislature of Illinois, and authorized to construct a railroad from Warsaw, on the Mississippi River, to the east line of the State. In February, 1857, an act was passed by that Legislature amending the charter of the company, by which the line of the railroad was divided into three divisions, designated as the western, the central and the eastern, and each division was created a new company, so that there were three distinct corporations in place of the original corporation. *It was held* "that a subscription of stock and issue of county bonds, authorized upon a vote of the people of the county to the original corporation, could not be legally made to one of the three new corporations."

And this in a case where the line of road was the same, the objects to be attained were the same, and the companies were the same, except in name.

If, however, the action of the County Court was intended as a new subscription to the capital stock of the St. Louis and St. Joseph Railroad Company, then it was null and void, because there was no vote of the people of the county upon which to base it, and it therefore falls under the ban of the constitutional and statutory prohibition. The subscription being thus void, the bonds issued upon it were also void, because it requires a previous valid subscription to complete the contract and authorize the issue of the bonds.

This doctrine is asserted by different courts of the last resort in various cases. Thus, in the case of Aspinwall, et al. vs. Commissioners of the County of Daviess, 22 Howard, 378. In that case, Mr. Justice Nelson, in delivering the opinion of the court, says: "It is insisted that the contract of subscription became complete when, at the election, a majority of the votes was cast in its favor, and did not require the form of a subscription on the books for the stock of the railroad company to make it obligatory upon the parties; and which, if true, it is agreed the contract would be protected within the Constitution of the United States, as it would then have been complete before the constitutional prohibition of Indiana. But the Court is unable to concur in this view. It holds that a subscription was necessary to create a contract binding upon the county, on one side, to take the stock and pay in the bonds; and upon the other, to transfer the stock, and receive the bonds for the same. Until the subscription is made, the contract is unexecuted and obligatory upon neither party."

This doctrine is well settled by the Supreme Court of Missouri.

In Missouri, two classes of cases appear: In the one, the authority to subscribe for stock and issue bonds in payment of it was delegated in the various charters granted by the General Assembly to the different railroad companies prior to the adoption of the Constitution of 1865, and in the absence of a constituitonal prohibition, in which cases the bonds in the hands of innocent purchasers, for value without notice, have been held to be valid.

In the other, the constitutional prohibition obtains, and the general incorporation act having adopted it, all cases that have since been adjudicated the Supreme Court of Missouri has held, "that bonds issued without an election are void, for want of power to issue them, in whose hands soever they may be, and are not validated by the levy of taxes and the payment of interest thereon."

In Steins et al vs. Franklin County et al, 48 Mo., page 185, Judge Wagner, in referring to Flagg et al vs. The City of Palmyra, 33 Mo., 440, the Hannibal & St. Joseph Railroad Company vs. Marion County, 36 Mo., 294, and Barrett vs. Schuyler County, 44 Mo., 197, uses the following language:

"By an examination, it will be seen that every one of them, the qualified voters, had voted to confer the authority, and that some mere irregularities had existed as to the manner of giving the notices or casting up the vote. These irregularities could not be expected, nor were they necessary to be known to the purchasers. The only matter in which they were concerned was to know whether the power to issue the bonds existed. The taking and obtaining the majority vote in this case was the prerequisite—the *essential thing which gave the investiture of authority and conferred jurisdiction.* The Court possessed no power except what it derived from law, and that was only to imitate the proceedings by which the power might be called forth. The real authority came from the voters at the polls. If they sanctioned the measure and authorized the expenditure, the Court could then proceed and carry out their will; otherwise, not. Till the votes were taken and a majority of them were cast in favor of the proposition, the Court had no authority over the subject matter, *and their action was a total nullity.*"

In Steins et al vs. Franklin County, 48 Mo., 175, the contract was originally made and the County Court proceeded under the authority of the act of the Legislature concerning Roads and Highways, approved February 16th, 1865. In that case, it was admitted that the question was not submitted to the voters of Franklin county, and that no election was had for the purpose of

determining the matter. The County Court, as in the case at bar, proceeded of its own motion, without consulting the people, and entirely ignored this provision of law. The Court, in the opinion, page 187, says: "*As no* election was ever ordered, and no vote taken in this case, the Court had no jurisdiction whatever, and acted wholly without authority, and hence the bonds were void."

In The State of Missouri to use of Neal vs. Saline County Court, 48 Mo., Page 393, Judge Bliss, in delivering the opinion of the Court, uses the following language: "If the holder is to assume the vote from the mere issuing of the bonds, then the county would be prohibited from showing that there was no such vote, and county agents would be enabled to commit the grossest frauds by issuing them without any authority whatever; for *the real authority comes from the people, and the Statute only enables the people to bestow it.*"

The same doctrine is held in St. Joseph & Denver City Railroad Company vs. Buchanan County, 39 Mo., 489. In Carpenter vs. The Inhabitants of the Town of Lathrop, 51 Mo, 483, an election was held, but no returns had been made by the judges of the election to the Board of Trustees of the town. There was no record of the action of the Board in determining the result of the election, and as this duty devolved upon the Board of Trustees, and not having determined in an official way whether the requisite majority of the qualified votes were cast in favor of the subscription, the Court held the bonds void for want of power to issue them.

Under the Constitution and statute of Missouri, then, two things must concur before the County Court had any power to issue the bonds in controversy. First, a subscription must have been authorized by a vote of two-thirds of the qualified voters of the county to the capital stock of the St. Louis and St. Joseph Railroad Company, and, second, a subscription must have been actually madè by the County Court to the capital stock of said company, based upon that vote.

If either or both of these requisites be wanting, the issuing of the bonds was totally void for want of authority in the County

Court. The same doctrine is held by the Supreme Court of California, 25 Cal. Rep., 635 : by the Supreme Court of Pennsylvania, 29 Penn., 186; by the Court of Appeals of New York, Gould vs. Sterling, 24 N. Y., 464; Starin vs. Genoa, 23 N. Y., 452; People vs. Mead, 36 N. Y., 224; by the Supreme Court of Ohio, Treadwell vs. Commissioners, 11 Ohio, St. 183; by the Supreme Court of Illinois, Schuyler County vs. The People, 25 Ill., 181; Supervisors of Hancock County vs. Clark, 27 Ill., 305; Marshall County vs. Cook, 38 Ill., 45; by the Supreme Court of Alabama, in 22 Alabama Rep., 760; and The United States vs. City Bank of Columbus, 21 How., 356, illustrates clearly the principle that a corporate officer cannot bind the corporation by his unauthorized acts or representations concerning the authority of himself or others. Then, if the bonds in controversy were issued without authority, they are invalid in the hands of the plaintiff, even though he be an innocent purchaser.

This is ruled in the case of Marsh vs. Fulton County, 10 Wallace, 676, before cited.

It is there decided that " the authority to contract must exist before any protection as innocent purchaser can be claimed by the holder."

A careful examination of this case will show that in very many of its features it is on all fours with the case at bar.

The same general doctrine is held by the Supreme Court in the Floyd acceptances, 7 Wallace, 666.

So also in the case of the Mayor vs. Ray, 19 Wallace, 478. In this case Mr. Justice Bradley holds this language: "Where the power is clearly given," (to issue the securities) "and the securities have been issued in conformity therewith, they will stand on the same basis and be entitled to the same privileges as public securities and commercial paper generally, but where the power has not been given, parties must take municipal orders, drafts, certificates, and other documents of the sort, at their peril. Custom and usage may have so far assimilated them to regular commercial paper as to make them negotiable—that is, transferable by delivery or indorsement. This quality renders them more con-

venient for the purposes of the holder, and has, undoubtedly, led to the idea—so frequently, but, as we think, erroneously entertained—that they are invested with that other characteristic of commercial paper—freedom from all legal and equitable defenses in the hands of a *bona fide* holder. But every holder of a city order or certificate knows that to be valid and genuine at all, it must have been issued as a voucher for city indebtedness. It could not be lawfully issued for any other purpose. He must take it, therefore, subject to the risk that it has been lawfully and properly issued. His claim to be a *bona fide* holder will always be subject to this qualification. * * * The officers of the city have no authority to issue it for any illegal or improper purpose, and their acts cannot create an estoppel against the city itself, its tax-payers, or people. * * * Of course they" (the holders) "are effected by the absence of these essential ingredients; and all subsequent holders take *cum onere*, and are affected by the same defect."

We have cited from this opinion thus extensively because, whether it be considered as an authority or an argument, it is, in our judgment, alike decisive of the principle now under consideration.

It is true the securities, the validity of which were involved in The Mayor vs. Ray, were not municipal bonds, like those involved in the present case; but that, in our judgment, only makes that case stronger in our favor, for the reason that those securities belonged to a class which the city had a general power to issue; whereas, the bonds involved in this case are such as the County Court had no authority whatever to issue, except under special, positive enactments, and then only in the mode and under the restrictions imposed by law.

An essential part of that mode was by a vote of two-thirds of the qualified voters of the county to be cast in favor of the subscription at a general election, or at an election held specially for that purpose. Without such a vote the Constitution of the State of Missouri absolutely prohibits any subscription to this or any other railroad company.

The provision of the General Statute under which the St. Louis and St. Joseph Railroad Company was incorporated, and under which the bonds in controversy must be sustained, if sustained at all, is in entire conformity with the constitutional provision. The bonds in controversy could be made valid only by a substantial compliance with the law that authorized their issue. This point is fully decided in the case of the State, ex. rel. Lexington and St. Louis Railroad Company vs. Saline County, 45 Mo., 247.

In that case a vote of the people had been taken, the only want of conformity with the law being that neither in the order for the election nor in the vote cast was there any definite amount named as the amount to be subscribed.

The same principle is held in the State of Missouri to use of Neal vs. Saline County Court, 48 Mo., 392. But in this case it is said by the Judge who delivered the opinion of the Court that "when the law imposes such a condition upon the exercise of the power as a submission to a vote of the people, and an attempt has been made in good faith to comply with the condition, and it has been supposed by all parties to have been regularly complied with, the bond upon its face showing a compliance, strangers should not be required to look further."

But in the case of Steins et al vs. Franklin County et al, 48 Mo., 187, it was ruled that "as no election was ever ordered, and no vote taken in the case, the Court had no jurisdiction whatever, and acted wholly without authority, and hence the bonds were void."

So in the present case. No election was ever ordered, nor was any vote ever taken, and the Court had no jurisdiction either to make a subscription or to issue the bonds, and therefore the bonds issued were and are absolutely void.

And being absolutely void, the holder cannot claim for them the protection thrown around commercial paper generally, even though he had been an innocent purchaser, as we have already seen.

Let it be remembered that all these cases decided by the Court of the last resort of the State of Missouri are since the adoption of the constitutional prohibition.

It is said that an innocent purchaser is not bound to look beyond the face of the bond which recites that "these bonds being issued under and pursuant to an order of the County Court of Ray County, made under the authority of the Constitution of the State of Missouri, and the laws of the General Assembly of the State of Missouri, and authorized by a vote of the people of said county, at a special election held for that purpose."

To this we answer that such a recital cannot prevail against the records of the County Court which show that no election of the citizens, general or special, was ever held for the purpose of determining whether any subscription should be made to the capital stock of the St. Louis and St. Joseph Railroad Company; and especially so where the recital in the bond does not state that such vote was such as is required by the Constitution and Statute of the "State of Missouri."

In considering our second proposition, viz: That the bonds contemplated and authorized by section 17 of chapter 63, of the General Statutes, are, by section 18 of the same chapter, to be issued only to raise money to meet assessments on the subscription, when made, as such assessments are called in by the company, and bonds in payment of the entire amount of stock subscribed are wholly unauthorized. In Barton County vs. Walser, 47 Mo., page 201, it is held, "It is nowhere held that the county court is the general agent or representative of the county. It is a part of the State government, with specific powers, duties and functions. * * * Duties imposed upon the county court by the Legislature, it performs as acts of obedience to the Legislature directly as a State functionary, and not as an agent of the county. It is true, it can bind the county in some contracts, subject it to some legal obligations, and appropriate its money to certain objects, but these powers it exercises by virtue of authority derived from the State government and in obedience to State laws." The fact must be kept in view, that the Constitution of Missouri and the Statute

under which county courts derive their authority to act, absolutely prohibit said courts from making subscription and issuing bonds unless the terms of the Statute are complied with, and when the provisions of the law are complied with, the circumstances under which any bonds may issue, and the kind of bonds that may issue, are clearly defined.

The right to subscribe for stock in the company is dependent upon a vote of two-thirds of the qualified voters of the county favoring the proposition. The subscription having been made the county becomes a member of the corporation as a stockholder, and upon an exact equality of all other stockholders, and under the same liability, and no other, of the stockholders to pay the calls as made on the stock. For this purpose power has been conferred by law upon the county court to meet the calls upon the stock as made by a direct tax on the county. Section 18, chapter 63, General Statutes, or section 18, page 305, Wagner's Statutes, provides:

"Upon the making of such subscription by any county court, as provided for in the previous section, such county shall thereupon become like other stockholders to such stock, entitled to the privileges granted, and subject to the liabilities imposed by this chapter, or by the charter of the company in which such subscription shall be made; and in order to raise funds to pay the installments which may be called for from time to time by the board of directors of such railroad, it shall be the duty of the county court making such subscription to issue bonds, or levy a special tax upon all property made taxable by law for county purposes * * * * to pay such installments, to be kept apart from other funds, and appropriated to no other purpose than the payment of such subscription; but the total amount of tax levied for railroad purposes in any one year, in any county, shall not exceed thirty per centum of the subscription made by such county."

It is clear from the above provision of law that the county court must either raise the necessary funds by a direct tax, or by issuing the bonds of the county and selling them in the market and placing the proceeds in the county treasury as a special fund with which to pay the calls as made by the company. As appears from the agreed statement of facts in this case, no calls on the stock were ever made—no bonds were ever issued to raise a fund

to pay the calls—but the Court, without authority, issued bonds to the nominal amount of the par value of the stock subscribed for in the name of the county, and delivered them to the company in payment of such subscription.

The bonds upon their face are made payable to the Railroad Company, when by the law the County Court had no authority to issue such bonds to the Railroad Company, and the Railroad Company, by its charter, had no authority, express or implied, to take such bonds or to become the payee thereof in its own right or as trustee. Hence, it follows that the bonds are void for want of authority, and every holder of them took them with express notice of such want of authority in the county to issue them, and of the want of authority in the Railroad Company to take them as payee.

The statute before referred to, is that under which the County Court derives its power to act in cases of this sort; and it is the same law under which the St. Louis and St. Joseph Railroad Company derived its charter.

And this brings us to the consideration of our third proposition, namely:

That the various acts of the General Assembly, the Constitution of the State of Missouri, the records of the County Court, and the other facts and circumstances surrounding these transactions, are sufficient to affect the plaintiff with notice of the invalidity of the bonds and coupons.

We do not regard the establishment of this proposition as being essential to our defense, because if the bonds were void for want of jurisdiction in the County Court to issue them, notice to the plaintiff, or the want of it, is of no consequence. If, however, the issuing of the bonds should be held to be not void but irregular only, then the question of notice becomes important. Upon this question of notice, then, we will start out with this proposition, namely:

That "Whatever puts a party on inquiring amounts to notice, provided the inquiry becomes a duty, as in case of purchasers and creditors, and would lead to the knowledge of the requisite fact by the exercise of ordinary intelligence and understanding." Jaques

vs. Weeks, 7 Watts, 267. Hood vs. Fahnestock, 1 Pa., State Rep., 470.

And in Epley vs. Witherow, 7 Watts, 167, the rule is stated thus: "It is well settled that whatever is sufficient to put a purchaser upon inquiry, which would necessarily have led him to a discovery or knowledge of the adverse claim or interest, is sufficient to affect him with notice thereof."

Again: "Notice sufficient to put one upon inquiry as to the existence of a right or title is, in law, presumed to be notice of such right or title. But such presumption may be repelled by proof that he failed to discover such right, notwithstanding the exercise of due diligence." Rhodes vs. Outcolt, 48 Mo., 367.

So "a party, put by circumstances on inquiry as to a fact, is affected with constructive notice thereof." Oliver vs. Piatt, 3 Howard, 333; Jenkins vs. Eldridge, 3 Story, 182; Carr vs. Hinton, 1 Curtis, 390; United States vs. Sturgis, 1 Paine, 525, and Hinde vs. Oattier, 7 Peters, 252.

The pendency of proceedings in bankruptcy is constructive notice to all granters of property proceeding from the bankrupt. Morse vs. Godfrey, 3 Story, 365.

So "where a sale of a decedent's property is made without authority, the purchaser is presumed to have notice of it; it is his duty to inquire whether or not the requisitions of law were complied with." Patterson vs. Gaines, 6 Howard, 551.

Then to apply these authorities to the case and question in hand.

The County Courts of the several counties of the State of Missouri are courts of record. Each of these courts has, by general enactment—of which all the world is bound to take notice—a clerk to record all its proceedings, and a seal to verify and authenticate them. These proceedings of the County Courts, when once duly entered, are as fully, to all intents and purposes, public records, as are the records of the proceedings of the highest tribunal in the land. They are as much public records as are the records of the proceedings of any of the departments of the government, state or national.

These records, when made up, constitute the evidence, and the only evidence, of the acts and proceedings of these courts, unless indeed it be in cases where the records have been lost or destroyed.

Being, then, public records, they are constructive notice to all men of the acts, doings and proceedings of these courts.

When, therefore, the County Court of Ray County was clothed by the Constitution and act of the General Assembly of the State of Missouri with a special jurisdiction with reference to making subscriptions to the stock of railroad companies and issuing bonds in payment of such subscription, and the mode and manner in which that jurisdiction shall be exercised, are specifically prescribed; the records of the Court furnish the proper evidence as to whether such jurisdiction has been exercised in the mode prescribed.

In this case an essential pre-requisite to the making of any subscription to the stock of the St. Louis and St. Joseph Railroad Company, or the issuing of bonds, was the assent thereto of two-thirds of the qualified voters of the county, given at a general or special election.

Such an election could be ordered only by the County Court; and the order for such an election, if ever made, together with the result of that election, would necessarily be entered on the records of the Court and become a part of them.

Here, then, was a source to which the plaintiff and all others could look, and from which they could with certainty ascertain whether the coustitutional and statutory pre-requisites to the conferring of any authority upon the County Court to make any subscription or issue bonds, had been complied with.

To these records the plaintiff was bound to look, for they not only lay in the channel of his title to the bonds, and his right to recover upon them, but they were they which infused vitality into the bonds, if they ever had any vitality.

The County Court was but the agent of the county, and as such agent, its powers were very limited and very well defined by the Constitution and Statute. The County Court had no general

power to subscribe to the stock of this company, or to issue bonds in payment of such subscription.

This fact, taken in connection with the constitutional prohibition, was sufficient to put the plaintiff upon inquiry, which, if made and pursued in the proper channel, namely, through the records of the County Court, it would necessarily have led him to a discovery or knowledge of the total invalidity of the bonds.

It was as much the duty of the plaintiff to inquire whether or not the requisitions of law had been complied with prior to the issue of the bonds in controversy, as it was the duty of the purchaser to make a similar inquiry in the case of Patterson vs. Gaines, 6 Howard, 557.

But it is said that the bonds contained a recital that they were issued under and pursuant to an order of the County Court of Ray County, made under the authority of the Constitution of the State of Missouri, and the laws of the General Assembly of the State of Missouri, and authorized by a vote of the people of said county, at a special election held for that purpose, and that the plaintiff was not bound to look beyond that recital.

To this there are several answers, either one of which, we think, is conclusive.

First. It will be found, upon an examination of the cases where this view has been taken by the courts, that they were all cases in which there had been an attempt or effort made to comply with the pre-requisites of the statutes authorizing the subscriptions, and whatever defects there were in the execution of the powers, were held to be mere irregularities.

Second. The recitals in the bonds involved in this case are wholly insufficient to produce the effect contended for.

They do not recite the purpose for which they were issued. This was held to be necessary by Mr. Justice Miller in the case of Thayer vs. Montgomery County, Central Law Journal, vol. 1, 365. It does not appear in the recitals that the bonds were issued to aid in the construction of the St. Louis and St. Joseph Railroad, or for any other purpose authorized by law.

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Neither do the bonds recite that there had been any subscription made to the stock of that company, or that the bonds were issued in payment for stock.

Nor yet does it appear in the recitals that the County Court was authorized to make any subscription or issue these bonds by the assent of two-thirds of the qualified voters of the county. Nor indeed was any vote of any kind ordered by the County Court ; no vote of any kind was taken, and no subscription was made to the stock of the company; all of which would have fully appeared to the plaintiff if he had not, regardless of his duty in the premises, wholly neglected to make the inquiry that was plainly open to him, and which, if it had been made, would have inevitably led him to a knowledge of the want of authority in the County Court to issue the bonds.

It is idle to talk of the hardship of requiring purchasers of municipal bonds to examine the public records to ascertain whether or not the requirements of law have been so far complied with as to clothe the County Court with power to issue them.

It would be a much greater hardship to permit the County Courts, not only without authority, but in total disregard of a constitutional prohibition, to issue county bonds to any amount such court may see proper, thereby, in many cases, bankrupting the counties.

The present plaintiff in the purchase of the bonds involved in this suit was a mere volunteer. He purchased upon speculation. He cannot, therefore, claim that the rules which ordinarily govern in questions of constructive notice should be relaxed in his favor.

The bonds in controversy in this case, taken in connection with the act of the General Assembly under which the only vote ever cast by the citizens of Ray County upon the question of the making of any subscription and issue of county bonds was given, contain sufficient upon their face to put the purchaser upon inquiry at least, as to the authority of the County Court to issue them.

The statutes under which that vote was taken, and the vote cast, authorized a subscription to be made to a different road, for

a specific purpose, upon specific conditions, and the bonds to be issued payable only in the city of Richmond or the city of Saint Louis, as the County Court might determine. The bonds in controversy were made payable at the American Exchange Bank, in the city of New York.

Here was such a variance as ought to have put the plaintiff upon inquiry; if he had exercised the same degree of care and diligence in examining the public records that he or any other man of ordinary care and prudence would have exercised if purchasing a piece of ground twenty feet feet square in the town of Richmond, that examination must inevitably have led him to the knowledge of the want of authority in the County Court to issue the bonds.

Having totally failed in the exercise of that care and prudence, he cannot visit the consequences of his own negligence upon the tax-payers of Ray County. It is high time that the courts should let it be known that the over-burdened tax-payers have still some rights which volunteer speculators are bound to respect.

We come, then, briefly to consider our third and last proposition, namely: That the defendant is not estopped or precluded from setting up the invalidity of the bonds and coupons by reason of the payment of a portion of the interest upon them.

If the defendant be estopped upon this ground, it can only be so for the reason that the payment of interest on the bonds was a ratification of them.

But if the bonds were void for want of authority in the County Court to issue them, they were incapable of ratification. A voidable act may be ratified, but a void act cannot. There are no degrees of comparison of the adjective "void."

You cannot say that one act is void, another more void, and a third most void.

If an act be void it is a mere nullity. If a contract be void it is incapable of ratification without such new and sufficient consideration as would support a new and independent contract. And herein consists the real distinction between acts or contracts that are void and such as are merely voidable, that the first are incapable of ratification, while the latter may be ratified.

In considering this question of a ratification of the bonds, we must not lose sight of the fact that the bonds were issued and the interest was paid by the same agent, the County Court. If the County Court issued the bonds without authority, it had no authority to pay interest upon them.

The County Court could not make one wrongful and void act valid by the performance of another act which was equally void for want of authority. This is so on principle, and it is equally true upon authority.

"A ratification being in its effect, upon the act of the agent, equivalent to the possession by him of a previous authority, and operating upon the act ratified in the same manner as though the authority of the agent to do the act existed originally, can only be made when the party ratifying possesses the power to perform the act ratified. Accordingly where supervisors of a county possessed no authority to make a subscription or issue bonds to a railroad company, in the first instance, without the previous sanction of the qualified voters of the county, they could not ratify a subscription to the company already made without such authority." Marsh vs. Fulton county, 10 Wallace, 677.

So in the case of The Mayor vs. Ray, 19 Wallace, 478; it was held that where the officers of the city had no authority to issue the security, their acts could not create an estoppel against the city itself, its taxpayers or people.

Apply the doctrines annunciated in these cases to the case at bar and they conclusively rule the point now under consideration.

But aside from all this, the defendant would not be estopped from setting up this defense to the present action unless the plaintiff had alleged in his pleadings and proved on trial that he had notice of the payment of interest upon the bonds before he became the purchaser of them, and that he was influenced thereby, to some extent at least, in making the purchase, neither of which has been done.

This is an admission on part of plaintiff that he purchased the bonds in controversy as a mere volunteer speculator, without having first made inquiry of those things necessary to satisfy the

mind of a reasonable man as to their validity. Interest had been paid, yet his pleadings, in effect, admit that he knew nothing of it. Certainly the doctrine of estoppel has not been carried so far as to preclude a defense—when the facts and circumstances show that plaintiff, himself, with so much before him to put him upon inquiry has willfully refused to notice these facts. He has willfully remained ignorant of the truth which lay open before him, and which could have been ascertained without an inconvenient investigation. It is certainly not the duty of the courts to come to his relief in the hour of extremity, when he could have avoided the loss by discharging a duty he not only owed to himself, but which the law imposes.

The appellant, therefore, seeks to reverse the judgment of the Circuit Court on the following grounds:

1st. That no election was ever held whereby to obtain the assent of the qualified voters of Ray County to a subscription to the capital stock of the St. Louis snd St. Joseph Railroad Company. A preliminary notice and submission of the proposition to be voted on is necessary in order to give the County Court jurisdiction of the subject matter. In other words, the County Court making a subscription for stock and issuing bonds in payment of it, without a submission of the proposition to the qualified voters of Ray County, would be like a judgment of a court which should be rendered against a man without service of summons or notice upon him; it would be absolutely void "*ab initio*."

2. The County Court exercises a delegated authority and is bound to pursue it strictly. This is the rule upon principle and authority as well, and if violated, the bonds are necessarily void.

3. These bonds were issued in violation of the Constitution of Missouri, article eleven, section 14. "The General Assembly "shall not authorize any county, city or town to become a stock-"holder in, or to loan its credit to, any company, association or "corporation unless two-thirds of the qualified voters of such "county, city or town, at a regular or special election to be held "therein, shall assent thereto." Also in violation of two express

provisions, 17 and 18 of the Statutes of Missouri, entitled Railroad Companies.

4. The plaintiff was bound to take notice of the limitations on defendant's power to contract. (The Aspinwall case does not conflict with this principle.)

5. The County Court acting under limited powers, the people are not estopped from enquiring into the extent of its powers, and from defending on the ground that it exceeded its authority.

6. The effect of the Constitutional inhibition is to prohibit the County Court from making a subscription and issuing bonds in payment of it.

W. S. Everett
of counsel

IN THE

Supreme Court of the United States.

No. 216.

THE COUNTY OF RAY, Plaintiff in Error,

vs.

HORATIO D. VANSYCLE, Defendant in Error.

Argument

OF

WILLIAM S. EVERETT,

Att'y for Plaintiff in Error.

CHICAGO:
Beach, Barnard & Co., Legal Printers, 104 Randolph Street.

1878.

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Argument of William S. Everett,

Att'y for Plaintiff in Error.

STATEMENT OF FACTS.

In December, 1859, an act was passed by the Legislature of Missouri, to incorporate the Missouri River Valley Railroad Company, with power and authority to construct a railroad from any point on the North Missouri Railroad, in Randolph County, by way of Brunswick, in Chariton County, thence through Carroll, Ray and Clay Counties, to any point on the Missouri River, in Platte County.

The 20th section of this act authorized the county court of any county in which any part of the route of said railroad may be, to subscribe to the stock of said company, and to issue bonds in payment thereof.

On the 30th day of March, 1860, the Legislature passed on act amendatory of the foregoing act, which authorized the county of Ray, with other counties, to issue bonds upon certain terms and conditions. Under the conditions of this amendatory act, and the provisions of the general railroad law, the county court of Ray County made an order for an election to be held on the 13th day of August, 1860; at which election the question was voted on favorably, and stock to the amount of 2,000 shares of $100 each was subscribed, but as a fact, no bonds were issued.

On the 10th of February, 1864, a further act was passed by the Legislature, for the extension and completion of the Pacific Railroad to the western boundary of the State, at Kansas City, and the North Missouri Railroad to the Iowa State line, to complete the southwest branch of the Pacific Railroad, &c.

By the 12th section of said act it will be seen that provision is made for the transfer of all the property, rights and credits, which were of the Chariton and Randolph Railroad Company and the Missouri Valley Railroad Company, by a vote of the stockholders, to the North Missouri Railroad Company, and upon the latter accepting the same the said first mentioned companies should cease to exist as such corporations, and afterwards be known and styled as the West Branch of the North Missouri Railroad. This transfer of the franchises and property of the two corporations above named was not voted on by the people of Ray County, but has its validity, if any it have, in the act of the Legislature, approved February 10th, 1864. And as a fact, no bonds were under this act issued by Ray County, to the North Missouri Railroad, although the transfer in other respects as provided by said act, was made as appears from the acceptance on file in the office of the Secretary of State, bearing date April, 1864.

On the 16th day of February, 1865, a still further act

was passed for the completion of the North Missouri Railroad and its west branch; and the 14th section of said act provided, that North Missouri Railroad Company shall locate its west branch road from Richmond, in Ray County, *provided* Clay and Platte Counties would subscribe $200,000 each, toward the construction of said west branch road — which subscription was not made by said counties.

On the day of , A. D. 1865, the people of Missouri adopted a new constitution, which contained the following provision — Article II, Section 14: "*The* "*General Assembly shall not authorize any county, city or* "*town, to become a stockholder in, or to loan its credit to* "*any company, association or corporation, unless two-thirds* " of the qualified voters of such county, city or town, at a " regular or special election, to be held, shall assent " thereto."

This constitutional prohibition was brought into operation by an act of the Legislature, which appears in Wagner's Statutes, page 305, section 17, which provides, "That towns, &c., may take stock in any railroad com- " pany, provided that two-thirds of the qualified voters of " such county, city or town, at a regular or special elec- " tion, to be held therein, shall assent to such subscription."

On the 13th day of December, 1866, the justices of the county court of Ray County and the officers of the North Missouri Railroad Company made an agreement, under the terms of which the said railroad company was to build, run and operate the west branch of the North Missouri Railroad to the town of Richmond, in Ray County. The said pretended contract was entered into by the county court judges, without any vote of the people authorizing it. (The said contract is set out in full in the record herein, commencing on page 19.)

On page 24 of the record appears the order of the said county court judges, under which they attempt to

carry into effect the agreement before referred to; and on the same page appears an order, by which Isaac A. Sturgeon was appointed, and authorized to vote the stock of said county at the next election of directors for the North Missouri Railroad Company.

On the 15th day of February, 1868, the St. Louis and St. Joseph Railroad Company was organized into a corporation under the railroad law in force at the time, and a copy of the articles of association, duly subscribed and sworn to, and filed in the office of the Secretary of State. (See Record, page 27.)

And it may be stated, in this connection, that the general incorporation act, under which the St. Louis and St. Joseph Railroad was chartered, contains the provision which requires that two-thirds of the qualified voters give their assent, at a general or special election, before the county court of any county in the State is authorized to issue bonds in aid of any railroad.

On the 19th day of December, 1865, an order is made, (see Record, page 24,) by the county court, to vote the stock of the county, at the election of directors, to the North Missouri Railroad Company ; which stock was authorized, by a vote of the people of Ray County, at an election on the 13th day of August, 1860, to the Missouri River Valley Railroad Company ; and on the 2nd day of November, 1868, (Record, page 24,) the county court make an order to issue $50,000 of the bonds of Ray County to the St. Louis and St. Joseph Railroad Company, and follows with other orders, to wit : On the 8th day of August, 1869, fifty thousand dollars ($50,000). On the 4th day of November, 1869, fifty thousand dollars ($50,000). On the 9th day of February, 1870, fifty thousand dollars ($50,000). Making in all two hundred thousand dollars ($200,000).

It will be seen, from this statement of facts, that there is no connection whatever between the St. Louis and St.

Joseph Railroad Company, to whom the bonds were issued, and the Missouri River Valley Railroad Company, to whom the people of Ray County voted the stock.

The vote taking place in 1860, to one company, and the bonds issued during the years 1869 and 1870, to an entirely different company.

On page 34, (Record,) it is admitted as a fact, and so found by the court below :

(20.) "The county court of Ray County did not, in fact, "at any time, make any proposition or order by which the "question was submitted to a vote of the citizens of Ray "County to subscribe to the capital stock of the St. Louis "and St. Joseph Railroad Company.

(21.) There was no election held "at which the citi- "zens of Ray County authorized the county court to sub- "scribe to the capital stock of the St. Louis and St. Joseph "Railroad Company, and issue bonds in payment of the "same, in any sum whatever."

(22.) "The charter of the St. Louis and St. Joseph "Railroad Company contained no provision by which the "County Court was authorized to subscribe to the capital "stock of said railroad company without a vote of the peo- "ple."

On page 32 (Record) it is stated that four certificates of stock were issued by the said railroad company, in payment of said bonds, and delivered to the County Court—each certificate dated January 11th, 1870—after one hundred and fifty thousand dollars of bonds had been issued by the County Court and delivered to the railroad company. In order to show further, if possible, the fraud perpetrated by the St. Louis and St. Joseph Railroad Company upon the people of Ray County, it is admitted, as appears by Record, page 34, that the company was declared bankrupt by a judgment of the United States District Court for the Western District of Missouri, upon a petition of the creditors of said railroad company, in January, A. D. 1872.

ARGUMENT.

If there be any rule of law or equity under which these bonds can be declared valid, I confess I have failed in my researches to find it. The mere statement of the facts ought to be sufficient to refute any theory that may be advanced to sustain them.

It will be insisted, first—

That the County Court of Ray County had power; and second—

That the recitals in the bond estop the county to deny their validity.

It is well settled that county judges had no power to issue bonds binding upon the county, without an investiture of authority conferred by a vote of the people. The Supreme Courts of Missouri, and of the United States, have given that construction to the statutes of that State. Here it is admitted that no proposition was ever submitted to the voters of that county, and that no election was ever held. It is also well settled that if the bonds were issued without authority, the county is not estopped to defend against their payment.

The law does not create or make a liability, upon the mere statement of an agent. There is no difference in the law, between the acts of agents of private individuals, and those acting for municipal bodies. They both act under special authority, and must act strictly within the limits of their power, or their acts will not be valid and binding. The judges of a county court act under limited authority, and certainly cannot be said to have power by mere recitals, to cure any inherent defect in their jurisdiction arising from want of power.

Here, too, were bonds issued in the face of the constitutional inhibition. This provision creates a condition precedent, and makes it mandatory by the negative terms used, and therefore carries with it notice, unless the fact

appears that two-thirds of the qualified voters did vote at an election held for that purpose.

The purchaser is held to a knowledge of the requirements of the constitution, and cannot protect himself, and claim to be an innocent holder for value, under the vague and general phraseology which makes up the recitals of the acts of the county judges, as set forth in the bond. In *Lynde* v. *The County*, 16 Wallace, page 13, all the prerequisites necessary to sustain the bonds must appear. The recital must be sufficient to show that the proper election was held, and the requisite vote given.

The courts of the land have, in repeated cases, settled the question, that the question of power, under which the court acts, may always be inquired into. The holder of bonds, therefore, is held to a knowledge of the provisions of the constitution of the State, and the laws enacted under it. The inhibition in the constitution is notice to every one, that certain things must be done before an authorization to issue bonds takes place. The records kept by the county judges are open to the public for inspection, and they will always show what has been done by the court to acquire the necessary power to issue bonds.

Here was no record. In fact no proceedings of any sort were had—the court acted like independent persons—neither consulting any one, nor proceeding, as pointed out by law. There is certainly enough to put a reasonable man upon inquiry, and once being put upon inquiry, he is held to whatever that would disclose. The conclusion is evident; the logic is short, that the requirements have not been complied with, and therefore the inhibition obtains.

Bonds issued without an election, are issued in violation of the constitution, and the act of the court issuing them is a wrong that cannot ripen into a right, by the mere use of words on the part of the wrong-doer.

If the recitals in the bond are curative of wrong, then

the constitutional inhibition is a mere nullity. The inhibitory clause of the constitution is a limitation of the power of the legislature. The legislature could not authorize any agent or court to issue bonds, by any statute it might enact. The County Court derives its power solely from the legislature, and has at least a very limited jurisdiction. It is clear that the inferior tribunal cannot clothe itself with power beyond the superior ; and therefore, if the County Court undertakes and completes in form that which it had not obtained jurisdiction of in law, the act is a mere nullity, utterly void, and of no effect.

An election, as a fact, is necessary to the power, and the power cannot be obtained in any other way. The want of power relates to the assent of two-thirds of the qualified voters, and is not, nor can be, cured by the subsequent recitals, or orders of the County Court.

The election must not only take place, but the constitutionally required number of qualified voters must assent thereto ; a majority of the votes cast in favor of the proposition is not sufficient, nor is two-thirds of those voting sufficient to confer the power—it must be two-thirds of the whole number entitled to vote in the county. This is warranted by the language of the constitution. It can mean nothing else. The qualified voters alone are clothed with authority to confer the power, and, therefore, the necessity to have the assent of the required number.

It is not the canvass of the vote or recital of the result of the vote which determines the question. This is only the evidence of the fact that an election has been held. Suppose the returns show the result adverse, but the court, nevertheless, issue the bonds, and on their face recite that they were issued in accordance with the laws of the State, and the vote of the people, had on a certain day for that purpose; would bonds so issued be legal and binding upon the county in the face of the constitutional inhibition, although in the hands of third parties, who may have been

influenced by the recitals to buy them ? Certainly not. The court, under such circumstances, would not have had jurisdiction of the subject matter, and could not cure the defect, by any language it might choose to employ on the face of the bonds. The law prescribes the mode of acquiring jurisdiction, and unless that mode is pursued, no jurisdiction obtains, and, therefore, no validity to the acts of the court, no matter who may have been misled, or to what extent, by the untruthful statements made by the court.

How much stronger, therefore, is the case when no vote has been had at all, and no record of any order for an election ; but the fact is admitted that no election has been held, and the bonds issued against the positive constitutional inhibition. This case is as strong as though an election had been held, and every qualified voter had voted against the proposition, and the court, in disregard of the unanimous opposition, had issued the bonds ; certainly, in that instance, the people would not be estopped from showing the facts, notwithstanding the recitals. The people, in inserting the inhibition in the constitution, evidently intended to protect themselves against an undue exercise of power on the part of courts of limited jurisdiction. This inhibition is not only a mandate, but a limitation of power as well, expressed in the negative and prohibitory form, for the very purpose of rendering it self-enforcing, so that all legislation, even in conflict with it, might be absolutely null and void, to all intents and purposes *de jure et de facto*, and it does not fall to the ground by untruthful recitals. The question of taxation is back of it, and it is here, that the rights of the people must be respected ; first, by the county court, and on their failure to do so, then the courts of higher power, where the wrong can be redressed and the burden removed. Taxation cannot be imposed unless in the mode and manner prescribed, and for purposes contemplated by law.

If a representative who shall not have attained the required age be elected to Congress, the election regular, and the same certified to by the proper officers, it does not follow, because his credentials are full and complete in form, and his commission made in due form of law, that he is entitled to his seat, and the emoluments of the office to which he claims to have been elected. The constitutional inhibition interposes and renders the election, and everything connected with it, utterly void.

It is not the question of the election or the commission that issues as the result of the election, but it is the question back of all these — the age of the claimant — and this question is determined by the constitutional clause disqualifying the claimant on account of his age.

The question of age coming in conflict with the inhibition, the election and all proceedings under it are a nullity. The operation of the constitution is to render the entire proceedings absolutely void.

We submit, therefore, that the only rule which fulfills these demands is, that which treats all orders, judgments, and recitals of courts of limited jurisdiction, when they are in open violation of the constitutional inhibition, as null and void. That such courts cannot assume jurisdiction, and thus render their acts valid, when the legislature is powerless from the same cause to confer jurisdiction. Here is found the duty of the purchaser of bonds. He must ascertain whether the Court had jurisdiction of the subject matter, and cannot be protected by the language used by the Court to show its authority.

Where the constitution inhibits the act unless certain conditions precedent are complied with, was the election actually held, and did two-thirds of the qualified voters give their assent to the issue of bonds at such election? is the inquiry that the purchaser in open market is bound to make; otherwise he buys at his own risk, and ought not to complain if the risk becomes greater than he contem-

plated. He cannot plead ignorance of the law in the face of the constitutional inhibition, as perhaps he might of some lurking and obscure statute which required certain conditions to be complied with. Here is a constitutional disability paramount to all statutory law, which he is bound to notice, because it is only upon compliance with it that the Court has power to issue the bonds.

His duty in this regard is equally binding with that of the Court.

The inhibition puts every one upon inquiry; and when once put upon inquiry, they are held to a knowledge of all that the investigation may lead to.

If a proposition was submitted to the people to aid in building a mill, and the election result entirely in favor of the proposition, and the Court were to issue bonds, could these bonds be held valid? Certainly not, and the reason is obvious. The law is equally clear that its requirements must be wholly complied with, or bonds issued for any purpose, are invalid. The law provides for the issue of bonds to aid railroads, but on certain conditions only, *provided that two-thirds of the qualified voters give their assent thereto at a general or special election held for that purpose.*

In the case of *Harshman* v. *Bates County*, 2 Otto, page 569, the bond contained this recital:

"This bond being issued under and pursuant to an "order of the County Court of Bates County, by virtue "of an act of the General Assembly of the State of Mis- "souri, approved March 23, 1868, entitled An Act to "facilitate the construction of railroads in the State of "Missouri, and authorized by a vote of the people taken "May 3d, 1870, as required by law, upon the proposition "to subscribe $90,000 to the capital stock of the Lexing- "ton, Chilicothe and Gulf Railroad Company, and which "said railroad company last aforesaid, and the former "Pleasant Hill Division of the Lexington, Chilicothe and "Gulf Railroad Company, were on the 4th day of Octo-

" ber, 1870, consolidated, as required by law, into one " company under the name of the Lexington, Lake and " Gulf Railroad Company, and which said last named " railroad company, as provided by law, and under the " terms of said consolidation thereof possesses all the " powers, rights, and privileges, and owns and controls all " the assets, subscriptions, bonds, moneys, and properties " whatever of the two said several companies forming " said consolidation, or either one of them."

These recitals are equally full with the case at bar.

The Court in the opinion delivered in the Bates County case, say: " Now the law of 1868, only requires the " assent of two-thirds of the qualified voters who vote at " such election. This is certainly a broad difference, and " if the constitutional restriction extends, by implication, " to townships, as well as to counties, cities and towns, an " election not conforming to the requirements of the con- " stitution, would be invalid, and confer no authority to " make a subscription. The petition in this case only " alleges that two-thirds of the qualified voters voting at " the election, voted in favor of the subscription, which " does not satisfy the demands of the constitution."

And further on in the same opinion, the court say:

" That the framers of the constitution intended to require " the assent of two-thirds of all the qualified voters of a " county, city, or town, as a pre-requisite to a subscription " to a railroad or other company, and did not intend the " same thing with regard to townships."

And further on the court say:

" If the legislature could clothe these geographical por- " tions of a county with power to subscribe to stock com- " panies at all, it certainly could not set at naught the con- " stitutional requirement of the peoples' consent thereto."

If, therefore, it be true that the legislature could not set at naught the constitutional requirement, how can the county court do it, by the mere use of words, as recitals in

the bond? The stream cannot rise higher than the source. The county court being created by the legislature, with limited jurisdiction, certainly cannot, under any circumstances, clothe itself with power beyond that which the legislature, could not do.

The court further say: "The court below did not decide the case on this ground, probably in consequence of "certain decisions of the State courts, which were deemed "inconsistent with it. But we are not aware of any decisions of those courts which hold that the constitutional "restriction in question could be ignored with regard to "townships, any more than with regard to counties, cities "or towns," and further, "*that sufficient notice of these "objections is contained in the recitals of the bonds themselves*, to put the holder on *inquiry*."

The recitals in the bond now under consideration in this case are not stronger than those in the Bates County case. They are as follows:

"This bond being issued under and pursuant to an "order of the county court of Ray County, made under "the authority of the Constitution of the State of Missouri, and the laws of the General Assembly of the "State of Missouri, and authorized by a vote of the "people of said county at a special election held for that "purpose."

The Supreme Court of Missouri has not held that two-thirds of the qualified voters are not necessary to an investiture of power to the court to issue bonds.

In the case of *The Schooner Freeman* v. *Buckingham et al.*, 18 Howard, 182, the question was as to the validity of certain bills of lading issued by the master of the vessel as against the owners. The bills had been signed and issued by the master for goods which were really not on board the vessel. Judge CURTIS, in delivering the opinion of the court, states the law as follows:

"If the signer of a bill of lading was not the master of

"the vessel, no one would suppose the vessel bound, and "the reason is because the bill is signed by one not in "privity with the owner. But the same reason applies to "a signature made by a master out of the course of his "employment. The taker assumes the risk not only of "the genuineness of the signature, and of the fact that "the signer was master of the vessel, but also of the ap- "parent authority of the master to issue the bill of lading. "We say the apparent authority, because any secret in- "structions by the owner inconsistent with the authority "with which the master appears to be clothed, would not "affect third persons. But the master of a vessel has no "more apparent, unlimited authority to sign bills of lading "than he has to sign bills of sale of the ship. He has an "apparent authority, if the ship be a general one, to sign "bills of lading for cargo actually shipped, and he has also "authority to sign bills of sale of the ship when in case of "disaster his power of sale arises. But an authority in "each case arises out of and depends upon a particular "state of facts.' It is not an unlimited authority in the one "case more than in the other, and his act in either case "does not bind the owner even in favor of an innocent "purchaser, if the facts on which his power depends did "not exist, and it is incumbent upon those who are about "to change their condition upon the faith of his author- "ity, to ascertain the existence of all the facts upon which "his authority depends."

This case is referred to, quoted from, and fully approved in the case of *Louisiana National Bank* v. *Larelle et al.*, 52 Mo., 380, in which it was held that a bill of lading, issued by a general agent of a vessel, for said purpose, but for goods not on board the vessel *was void* as to the owner, even in the hands of an innocent purchaser for value, although the bill itself recited the fact that the goods were on board the vessel.

This case clearly sustains the doctrine we contend for in this case.

In *Steins et al.* v. *Franklin County, et al.*, 48 Mo., page 185, the court of that State, in a case involving the validity of bonds issued in aid of railways, say: "The "court possessed no power except what is derived from "law, and that was only to initiate the proceedings by "which the power might be called forth. The real author- "ity comes from the voters at the polls. If they sanctioned "the measure, and authorized the expenditure, the court "could then proceed and carry out their will; otherwise "not."

In the same volume, on page 187, the court say: "*As* "*no election was ever ordered, and no vote taken in this case,* "*the court had no jurisdiction whatever, and acted wholly* "*without authority, and hence the bonds were void.*"

This authority covers the case at bar regardless of the fact as to how many may have voted, or as to the recitals in the bond. If without an election the bonds were issued, a fact admitted by the defendant in error, and the Supreme Court of the State having declared the law to be, that all bonds so issued are void, the conclusion is clear, and the logic is short.

This rule is well settled by this tribunal, the highest in the land, in many well considered cases.

The case of *The Mayor* v. *Ray*, 19 Wallace, 478, was a suit to recover certain drafts, or orders, regular and negotiable in form, which had been issued for the payment of the city indebtedness, about which there was no dispute, and which drafts bore the city seal. It was shown in evidence that the drafts or orders were issued without authority from the city council. Mr. Justice BRADLEY, in delivering the opinion of the court, says:

"When the power is clearly given and the securities "have been issued in conformity therewith, they will stand

" on the same basis, and be entitled to the same privileges " as public securities and commercial paper generally.

" But when the power has not been given, parties must " take municipal orders, drafts, certificates and other doc- " uments of the sort, at their peril. Custom and usage " may have so far assimilated them to regular commercial " paper as to make them negotiable; that is, transferable " by delivery or indorsement. This quality renders them " more convenient for the purposes of the holder, and has " undoubtedly led to the idea so frequently, but as we think, " erroneously entertained, that they are invested with that " other characteristic of commercial paper, freedom from " all legal and equitable defenses in the hands of a *bona* " *fide* holder."

The same doctrine is clearly held by this court in the *Floyd Acceptances*, 7 Wallace, page 666.

Also, in a case closely in parallel with this one, *Marsh* v. *Fulton County*, 10 Wallace, 676, the court say:

" The authority to contract must exist before any pro- " tection as innocent purchaser can be claimed by the " holder."

The doctrine presented in these and numerous other cases, applied to the case at bar, certainly fully sustain the theory we contend for, that unless the requirements of the constitution had been fully carried out by the county court, the bonds issued were issued without authority, and are therefore not the obligations of Ray County.

Received, Raleigh, N. C., this 6th day of August, 1874, from John C. Blake, disb'g agent, the sum of nine hundred dollars, in full payment of the above account. $900.00.

(Signed in duplicate.) PHILEMON B. HAWKINS.

The United States to P. B. Hawkins, DR.

On account of the appropriation for construction of the U. S. c. h. and p. o. at Raleigh, N. C.

Date.	Designation.	Application.	Amount.
1874.			Dolls. Cts.
July 31.	One hundred and fifty cubic yds. rubble-stone, @ $5.	Foundation walls.	750 00
	Less 10 per ct. retained..	.....	75 00
	Contract dated 18 May, '74.		$675 00

I certify that the articles above enumerated have been received and the services performed; that they were necessary for, 21 and have been or will be applied to, the construction of the U. S. c. h. and p. office at Raleigh, N. C., and that the prices paid were just and reasonable.

WM. A. HEARNE, *Superintendent.*

Received, Raleigh, N. C., this 4th day of August, 1874, from John C. Blake, disb'g agent, the sum of six hundred and seventy-five dollars, in full payment of the above account. $675.00.

(Signed in duplicate.) PHIL'A B. HAWKINS.

Paid by check on Ral. Nat. Bank, No. 76, dated Aug. 4, 1874.

The United States to P. B. Hawkins, DR.

On account of the appropriation for construction of the U. S. c. h. and post-office at Raleigh, N. C.

Date.	Designation.	Application.	Amount.
1874.			Dolls. Cts.
Aug. 31.	To 200 cubic yards of rubble-stone, @ $5.	Basement wall.	1,000 00
	Less 10 per ct. reserved.	.....	100 00
	Contract dates May 15, '74.		$900 00

I certify that the articles above enumerated have been received and the services performed; that they were necessary for, and have been or will be applied to, the construction of the U. S. court-house and post-office at Raleigh, N. C., and that the prices paid were just and reasonable.

WM. A. HEARNE, *Superintendent.*

Received, Raleigh, N. C., this 2d day of September, 1874, from John C. Blake, disb'g agent, the sum of nine hundred dollars, in full payment of the above account. $900.

(Signed in duplicate.) PHILA. B. HAWKINS.

7. The payments indicated by the foregoing vouchers were made by the officers of the United States as the delivery of stone progressed, and were made simply "on account."

8. Of the fifty cubic yards of rubble-stone delivered by the claimant and rejected by the defendants, no appreciable part was used in the wall, and the whole was hauled away and sold by the claimant, and the value thereof is included in the sum specified in the fifth finding.

9. The advertisement and proposal referred to in said contract, and forming part thereof, were as follows:

"*Advertisement for Proposals.*

"OFFICE OF SUPERINTENDENT
"UNITED STATES COURT-HOUSE AND POST-OFFICE
"AT RALEIGH, N. C., *July* 21, 1873.

"One thousand cubic yards, more or less, rubble-stone, which may be of granite, limestone, or other suitable stone, which is flat on the bed, sound, durable, and which breaks with a clean, square fracture; one-quarter to be bond-stones of a length equal to the thickness of the walls, and to contain not less than 10 cubic feet. No stone containing less than one and one-half (1½) cubic feet, or less than twelve (12) inches thick, will be received.

"S. P. CARROW, *Superintendent.*

"We propose to furnish the 'rubble-stone' necessary in building the court-house and post-office above mentioned for five dollars per cubic yard, in accordance with the specifications issued by the superintendent.

"Very repectfully,
PHIL*IP* B. HAWKINS."

Conclusions of Law.

1. The claimant is entitled to recover for 958¾ cubic yards of stone delivered by him, at the contract price of $5 per yard, and no more, less the amounts paid to him by the defendants.

2. He is also entitled to recover for fifty yards of rubble-stone delivered by him and rejected by defendants' officers, at the contract-price, less the market-value thereof.

3. And he is entitled to recover for 230 cubic yards of stone quarried and refused by defendants, at the worth of quarrying, less the market-value thereof.

BY THE COURT.

25 In the Court of Claims.

PHILEMON B. HAWKINS *vs.* THE UNITED STATES. } No. 10,706.

The assistant attorney-general, on behalf of the United States, requests the court to find the following facts:

I. Part of the 50 cubic yards first delivered were hauled away by the contractor, and the remainder were used in the wall.

II. Mr. Thomas' objection to this delivery was that the stones were so irregular in shape that squaring them up consumed the whole stone, and his view was that if more care was exercised in quarrying the labor of squaring up might be saved to the government, and the contractor would save the wastage.

III. The cost of quarrying such stone as the contract called for would have been $8 per cubic yard.

IV. The advertisement and proposal referred to in said contract, and forming part thereof, were as follows:

26 "*Advertisement for Proposals.*

"OFFICE OF SUPERINTENDENT
"U. S. COURT-HOUSE AND POST-OFFICE
"AT RALEIGH, N. C., *July* 21, 1873.

"1,000 cubic yards, more ore less, rubble-stone, which may be of granite, limestone, or other suitable stone, which is flat on the bed, sound, durable, and which breaks with a clean, square fracture; one-quarter to be bond-stones of a length equal to the thickness of the walls, and to contain not less than 10 cubic feet. No stone containing less than one and one-half (1½) cubic feet, or less than twelve (12) inches thick, will be received.

S. T. CARROW, *Superintendent.*

"*Oct.* 19, 1873.

"We propose to furnish the rubble-stone necessary in building the court-house and post-office above mentioned for five dollars per cubic yard, in accordance with the specifications issued by the superintendent. Very respectfully,

"PHILIP B. HAWKINS."

THOMAS SIMONS, *Ass't Att'y-Gen'l.*

27 Upon the foregoing requests, by the attorney-general, for additional findings of fact, the court makes the following rulings, to wit:

In response to the defendants' requests for additional findings of fact the court disallows the second, because it does not correctly set forth the fact as proved; and also the third, because not warranted by the evidence.

And the court allows the fourth. The first is not allowed in the form thereing set forth, but instead thereof the following additional finding is made:

(*No. 8 of the Findings of the Court.*)

Of the 50 cubic yards of rubble-stone delivered by the claimant, and rejected by the defendants, no appreciable part was used in the wall, and the whole was hauled away and sold by the claimant, and the value thereof is included in the sum specified in the fifth finding.

BY THE COURT.

28 RICHARDSON, J., delivered the opinion of the court:

On the 15th day of May, 1874, the claimant entered into a written contract with the defendants to furnish and deliver 1,000 cubic yards, more or less, of rubble-stone for building a court-house and post-office at Raleigh, N. C., at $5 per yard, net measurement in the building. In pursuance of his agreements he delivered 50 cubic yards of such stone at the site for the building, and he had quarried, ready for delivery, 250 cubic yards more, when the assistant superintendent, who had the immediate charge of the work for the defendants, rejected the stone delivered and refused to receive any more of the same kind, not because it was not up to the standard called for by the contract, but because he desired to make a wall superior to that specified, and he described to the claimant the kind of stone which he should require and which was in fact an altogether different class of stone, a ranged-rubble or broken-ashlar, worth $12.50 per cubic yard.

Rubble-stones are rough, irregular stones, such as are found in quarries that furnish small and inferior stone only, or are the remains in ledges from which dimension or other large stones have been taken; and when used for constructing walls they are not dressed, hewn, or cut, and so lose none of their measurement in laying. Ranged-rubble or broken-ashar are ordinarily a larger stone, which, when cut, trimmed, and laid, make a wall of coursed masonry as if constructed of squared stone of different sizes, somewhat like that produced by dimension-stone. And in cutting they are reduced in size, and measure much less in the wall than when first quarried. Such a wall is a more expensive one than that made of rubble-stone, and it was such a wall that the assistant

superintendent desired to construct, notwithstanding the contract and specifications.

This was a clear departure from the terms of the contract, and the claimant might then have declined to follow the directions of the assistant superintendent; and if they were persisted in, he might have maintained an action against the defendants for breach of contract in preventing him from going on with his work, or he might have notified the defendants that if he furnished such stone as the assistant superintendent required—a stone materially different and more expensive than that called for by his agreement—he should not deliver it under the contract at contract price, but should claim such compensation as the material was worth. Had he thus promptly notified the defendants, they would have had an opportunity to determine whether they would overrule the directions of the assistant superintendent or would go on according to his wishes and construct a more expensive wall than had been contemplated. But this opportunity was lost to them by the claimant's ready submission to the wishes of the assistant superintendent and by his long silence as to any claim for greater compensation. It was his duty when he was requested to deliver stone of a higher grade and more expensive kind than that contracted for, before he had delivered any such stone and before the defendants had acted upon the change, to have given notice and asserted his intention to demand a higher price therefor. He could not lie by and allow the defendants to go on upon the supposition on their part that they were incurring no extra expense until it was too late for them to recede, and then successfully spring upon them a claim for
29 other and different and greater compensation than had been agreed upon.—(Merrill et al. vs. The Ithaca and Owego R. R. Co., 16 Wend., 587.)

This change in the character of the wall to be constructed, and, consequently, of the stone required, appears to have been instituted by the assistant superintendent of his own motion, without the knowledge of the supervising architect of the Treasury Department, until the work was nearly done, and without the knowledge or approval of the Secretary of the Treasury, whose written consent was required by an express provision of the contract, to any departure from its conditions. This change the claimant at once submitted to, and expressed a willingness and a desire to furnish such material as would give perfect satisfaction to the government and its agents, only maintaining that he thought the stone he had delivered was up to the contract, and afterward, from time to time, asserting no more than that he was required to furnish a stone superior to that called for by the contract. These declarations did not necessarily imply that he intended or expected to charge a higher price, but merely that, to meet the wishes of the defendants' officers, he was doing better than he had agreed to do.

It was not until August, more than two months after he had begun to deliver the higher-class stone, which he had been furnishing almost every week in the mean time, and when his work was nearly half done and the building so far advanced with a ranged-rubble or broken-ashlar wall that it could not be altered, and must be finished as begun, that he first announced to the superintendents, and a special agent of the Treasury Department sent to inspect the work and set them right on it, his intention to make claim for an extra allowance, and it does not appear that this intention was ever communicated to the Secretary of the Treasury, for whom the contract was entered into, nor to the supervising architect, although at a later date the latter officer visited the work and was shown that the wall was superior to that contemplated by the specification; but nothing was said that would lead him to suppose the contractor was expecting larger compensation for the stone than the price agreed upon.

Besides, the claimant signed four vouchers for payments made on account, while delivering these stone, three of them apparently before the announcement of his intention to claim an extra allowance, and one afterward, in all of which the stone delivered is called "rubble-stone;" the price charged is the contract-price of $5 per cubic yard, and in the last three vouchers the contract is expressly referred to. These vouchers, thus made out and signed by the claimant, must have been forwarded to the Treasury Department, and there fallen under the inspection of the architect's office, and, constructively, under the eye of the Secretary of the Treasury.

Under these circumstances the Secretary and the supervising architect had no reason whatever to suppose that the claimant was delivering stone for which he claimed any other or greater price than that specified in the contract, nor had the superintendent and special agent any reason for such a supposition until it was too late to make other arrangements.

By his own acts, therefore, the claimant led the defendants to believe, while the work was going on, that he was delivering the stone at the contract-price, and he is estopped from setting up, after the work is completed, any greater rate of compensation.

On the other hand, the claimant is entitled to recover the contract-price for all the stone actually delivered by him in good faith and in fulfillment of his agreements. Whatever stone he delivered which the defendants' officers unwarrantably rejected, wasted, or misused and applied to purposes not contemplated by the contract, they must pay for, as well as for those that went into the walls of the building. And so the claimant is entitled to payment for the 50 cubic yards of rubble-stone first delivered and rejected, and which the facts find to have been such as came within the description of those required, deducting therefrom the market-value thereof, because they were taken away by the claimant, and to that extent he has been compensated; and for the 230 yards quarried,

and refused by the defendants, he is entitled to the amount found as the worth of quarrying, less the market-value.

He furnished also 958¾ cubic yards of ranged-rubble or broken-ashlar stone, and had those been laid as contemplated by the specifications, in such manner as to have constructed a "rubble wall," he would have been entitled to recover according to their net measurement in the wall, such being the express provision of the contract; but in that case the stone would not have been cut away, and they would have measured substantially the same after as before they were laid. The defendants' officers, in order to construct a wall of different kind and superior appearance to that originally designed and specified, with their workmen so cut, trimmed, and squared the stone delivered, that they lost 25 per cent. in measurement when laid in the wall. This was manifestly not warranted by the contract, and was a violation by the defendants of their plain obligation. It was done after the claimant had fulfilled his agreements, was not assented to by him, and was beyond his control to prevent. The "net measurement" mentioned in the contract by which the claimant was to have been paid, had reference to the "rubble-wall" contemplated therein, in the construction of which the claimant's stone would have lost little or nothing from the quantity delivered. When the defendants changed the character of the wall to be constructed, and cut, trimmed, and squared the stone contrary to the intent of the contract, and then wasted or deprived the claimant of the net measurement in the wall of 25 per cent. thereof, they became liable to pay for the wasted or unused material as well as for that which they did use, and the claimant is entitled to recover for the whole 958¾ cubic yards delivered by him at the contract-price.

The account between the parties as allowed to claimant is thus stated:

958¾ cubic yards of stone delivered under the contract, at $5 per yard		$4,793 75
50 cubic yards delivered and rejected by defendants		250 00
230 cubic yards quarried, at the worth of quarrying		805 00
		5,848 75
Deducting payments made by defendants to claimant	$3,825 00	
Market-value of stone rejected, including that quarried	456 80	
	4,281 80	4,281 80
		1,566 95

And judgment will be entered for the claimant for the balance, $1,566.95, thus found due him.

31 In the Court of Claims.

PHILEMON B. HAWKINS
vs. } No. 10,706.
THE UNITED STATES.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and the final judgment of the court thereon; of the application of the solicitor for the claimant for the allowance of an appeal, as filed in the clerk's office, March 13, 1877, and of the order of the said Court of Claims allowing the same; of the findings of fact by the court, and the conclusions of law thereon; of the requests of the defendants for additional findings of fact, and the rulings of the court thereon; and of the opinion of the court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Washington, this 29th day of May, A. D. 1877.

[SEAL.] JOHN RANDOLPH,
Ass't Clk Ct. of Claims.

(Endorsement on back:) Court of Claims. No. 700. Philemon B. Hawkins, Appellant, vs. The United States. Filed 29 May, 1877.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1877.

PHILEMON B. HAWKINS
vs.
THE UNITED STATES.
No. 700.

BRIEF FOR APPELLANT.

This is an appeal from a judgment of the Court of Claims awarding to the claimant the sum of $1,566.95. The claimant in his petition and amended petition claimed $8,962.50.—(p. 5.)

The controversy arose out of a contract made between the plaintiff and the United States on the 15th day of May, 1874. The contract was made in pursuance of an advertisement and proposals, and the plaintiff in terms bound himself to "deliver on the site of the court-house and post-office at Raleigh, N. C., one thousand (1,000) cubic yards (more or less) of rubble-stone, said stone to be in every way equal to the sample furnished with his bid, one quarter to be bond-stones of a length equal to the thickness of the walls, and to contain not less than ten (10) cubic feet, and no stone to contain less than one and one-half (1½) cubic feet, or to be less than twelve (12) inches thick, and said stone to be delivered at such times and in such quantities as may be deemed necessary by the superintendent, and in

full accordance with the advertisement and proposal hereto attached and forming a part of this contract."

The United States on its part agreed to pay the plaintiff for this stone at the rate of five dollars per cubic yard, the stone to be measured in the wall,—net measurement only to be allowed.

The contract contained a clause to the effect that no departure from its conditions should be made without the written consent of the Secretary of the Treasury.

Soon after the contract was made the claimant began to deliver stone such as was required by the contract, (other than "bond" stone,) but after he had delivered fifty cubic yards and had quarried and prepared ready for transportation two hundred and thirty yards more, the stone was rejected by the superintendent of the building, who refused to receive such stone from the claimant under the contract. This officer of the United States then directed the claimant to furnish stone known as ranged-rubble or broken-ashlar, which is a superior kind of stone, and was worth at that time and place, twelve dollars and fifty cents per cubic yard.

In pursuance of the directions of the superintendent in charge of the work, he caused to be quarried and delivered at the site of the building 958¾ cubic yards of broken-ashlar stone. This stone so delivered was cut, trimmed, and squared by the defendant's workmen, so as to make them suitable for such a wall as the defendant's superintendent chose to construct. The wall contemplated was a rubble wall, or one made of undressed stone of irregular shape, whilst that actually constructed was a ranged-rubble or broken-ashlar wall made of dressed stone. In trimming and squaring the stone one-fourth of the quantity was lost.

The claimant, at the time the stone furnished by him was rejected by the agent of the government, expressed his desire and willingness to furnish stone of such a kind as should satisfy the said agent, but insisted that the stone which he had furnished fully gratified the requirements of the contract,

and he from time to time called the attention of both the superintendent and his assistant to the fact that he was required to furnish stone superior to that called for by the agreement. And when the government inspector was sent to examine the work, in August, 1874, the claimant protested, and notified him, in the presence of the superintendent of the building, that he should demand compensation for the increased cost and superior quality of the stone. This inspector several times visited the work, and upon one occasion in company with the Supervising Architect of the Treasury; the superintendent then called the attention of the latter to the superior class of stone in the walls, and that officer assented to it.

As the work progressed the agents of the government made payments "on account." These payments were made on formal vouchers, in which the stone was designated as "rubble-stone" by the superintendent of the building. It was so designated by him because he "had no room for any other designation under the specifications." Appended to each of these vouchers is a receipt, in the usual form, signed by the claimant. These payments were made by the officers as the work progressed, and were made "simply on account." The Court of Claims awarded to the plaintiff the sum of $1,566.95, arriving at this result in the following manner, to wit:

For 958¾ cubic yards of stone @ $5		$4,793 75
" 50 " " " " delivered and rejected		250 00
" 230 cubic yards of stone quarried		805 00
		$5,848 75
Deduct payments to claimant	$3,825 00	
" value of rubble-stone rejected,	456 80	
		4,281 80
Balance due		$1,566 95

Errors of Law.

The Court of Claims erred in the measure of damages adopted. The contract having been abandoned as to the kind and quality of materials, by the act of the defendant, the claimant is entitled to recover the fair value of the materials delivered and accepted by the defendant, without regard to the price prescribed by the contract. The Court of Claims should have computed the 958¾ cubic yards of stone at twelve dollars and fifty cents per cubic yard, the value of the stone delivered, at the site of the building.

Points and Authorities.

The word "rubble," when applied to stone, means a small rough stone of irregular shape.—(*Webster; Worcester.*) Rubble-stone is that class of stone which is used in foundation or other walls in the shape in which it comes from the quarry. A "rubble wall" is one constructed of "rubble," or these undressed stone of irregular shape.

The plaintiff undertook to fulfill the contract and began the delivery of the kind of stone agreed upon. The defendant stopped him and rejected the stone he had delivered. He was then required to deliver stone worth more than double the quality he had bound himself to deliver. The plaintiff protested, and asserted that the stone called for was of a superior quality and of greater value, and that he should claim additional compensation. The defendant has accepted the material and is now in full enjoyment of it. Under these circumstances the plaintiff is entitled to recover the actual value of the materials, without reference to the contract price. This is the rule established by this court in *Dermot vs. Jones*, 7 Wall., 1; see, also, *Hayward vs. Leonard*, 7 Pick., 181, and 2 Smith's Leading Cases, 18. The case of *Merrill vs. The Ithica R. R. Co.*, 16 Wend., 587, upon which the Court of Claims relied to sustain its judgment, supports the above doctrine rather than the rule

of damages laid down and enforced in the opinion of that court.

The provision in the contract, that "no departure from its conditions shall be made without the (his) written consent" of the Secretary of the Treasury, does not alter the rule. The doctrine applicable to the statute of frauds, requiring agreements conveying an interest in lands to be in writing, applies here. Those, like ordinary contracts, may be varied by subsequent parol agreements.—(*Emerson vs. Slater*, 22 How., 41; *Goss vs. Nugent*, 5 Barn. & Ad., 58.) The verbal contract to furnish ranged rubble-stone, worth $12.50 per cubic yard, was a special agreement; it might have been revocable while executory, but it is not so after it has been executed. After execution everything done under it is to be regarded as rightful. In a common-law court the plaintiff would be entitled to recover the value of the material so delivered, upon the common counts in *indebitatus assumpsit*.—(*Dermott vs. Jones*, 2 Wall., 1; *Miller vs. R. R. Co.*, 6 Hill, 61; *Winter vs. Brookwell*, 8 East, 308; *Liggins vs. Inge*, 7 Bing., 692; *Wood vs. Manly*, 39 E. C. L., 19; *Munroe vs. Perkins*, 9 Pick., 298; *Allen vs. Jopnish*, 21 Wend., 628; *Smith vs. Gugerty*, 4 Barb., 614; *Dearborn vs. Cross*, 7 Cow., 48.)

The Supreme Court of New York in commenting on a provision contained in a contract, to the effect that timber should not be cut from lands without consent in writing, uses this language: "The most that can be said of a provision that the vendees should not cut timber without a written consent is that they might do it with such consent." —(*Pierrepont vs. Barnard*, 6 N. Y., 279. See further on this point the recent cases of *Solomon vs. United States*, 19 Wall., 17, and *Buckley vs. United States*, Ibid., 37.)

The loss of twenty-five per cent. caused by trimming and squaring the stone must fall upon the defendant, and not upon the claimant; and upon a correct application of the law the claimant is entitled to recover for the 958¾ yards

of stone at the rate of $12.50 per yard. This will give him—

For stone actually delivered—958¾ cubic yards..	$11,984 33
For the rubble-stone quarried and delivered in part.....	1,055 00
	$13,039 33
Deduct cash payments and value of stone rejected.....	4,281 80
Balance due plaintiff.....	$8,757 53

ENOCH TOTTEN,
Counsel for Appellant.

In the Supreme Court of the United States.

OCTOBER TERM, 1877.

PHILEMON B. HAWKINS
vs.
THE UNITED STATES. } No. 700.

APPEAL FROM THE COURT OF CLAIMS, SUBMITTED UNDER RULE XX.

Argument for the United States.

In the Supreme Court of the United States.

OCTOBER TERM, 1877.

PHILEMON B. HAWKINS
vs.
THE UNITED STATES. } No. 700.

APPEAL FROM THE COURT OF CLAIMS, SUBMITTED UNDER RULE XX.

ARGUMENT FOR THE UNITED STATES.

ARGUMENT.

By act approved June 10, 1872, c. 433, (17 Stats., 390,) it was enacted "That the Secretary of the Treasury be, and he is hereby, authorized and directed to cause to be erected a suitable building, with a fire proof vault extending to each story, at Raleigh, in the State of North Carolina, for the use and accommodation of the courts of the United States, post-office, and other offices of the Government, and for such purpose there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, one hundred thousand dollars, to be expended under the direction of the Secretary of the

Treasury, who shall cause proper plans and estimates to be made so that the whole expenditure for the erection and completion of the said building shall not exceed the sum hereby appropriated."

By the act of March 3, 1873, c. 277, (17 Stats., 524,) another hundred thousand dollars was appropriated for the erection of that building; and by that of June 23, 1874, c. 455, (18 Stats., 228, bottom,) it was provided "that the limitation on the cost of the court-house and post-office building at Raleigh, contained in the act of March 3, 1873, is hereby increased to $350,000, *which shall be the entire cost of said building.*"

I.

Such was the state of the legislation upon this subject during all the time covered by the advertisement for rubble-stone, by Mr. Hawkins's contract therefor, and by all that was done by him toward furnishing material for that structure.

By the then existing legislation, everybody, as well Mr. Hawkins as the officials employed about the premises, was bound to know that the Secretary of the Treasury was *alone* to direct as to the character and construction of the edifice; and he was to have the plans and specifications so prepared and *executed* that the whole expenditure should not exceed the statutory limitation. Not only was Mr. Hawkins conclusively presumed to know the extent, nature, and limitation of the power of those with whom he contracted and acted in this behalf, but he must have perceived that these careful restrictions as to the total expense would be useless if any mere subordinate of a subordinate could, of his own motion, depart from the plans and specifications so prepared,

and thereby enhance the cost of the material. If the assistant superintendent at Raleigh could require dimension-stone, where the contract, plans, and estimates were based upon the use of rubble, he might also substitute faced brick for common merchantable brick, if not marble for granite, &c.; and thus all the care of Congress and the plans of the Secretary, to whose supervision the matter was intrusted, to restrain the cost of this structure within a reasonable limit would be rendered nugatory by the unauthorized act of a subordinate, acting in some cases, perhaps, (we disclaim emphatically any purpose of insinuating, even, that it was so here) in the interest of the contractor, rather than of the Government. Not content to leave the parties to the operation of the general principle that the contractor is bound to know the extent of the authority of the public officer with whom he deals, this contract expressly required the approval of the Secretary of the Treasury, who did approve it August 1, 1874, and contained the stipulation that "*no departure from its conditions shall be made without his* [the Secretary's] WRITTEN *consent.*" (Record 4, folio 10, last provision before the attestation clause of the contract.) Without this clause, General Hawkins was bound to know the extent of the power of the person who was assuming to substitute in the foundation a better and more expensive article than that called for by the contract. Whiteside *v.* United States, 93 U. S., 256–7, citing Story on Agency, (6th ed.,) § 307, a; Lee *v.* Munro, 7 Cranch, 376; Baltimore *v.* Eshback, 18 Md., 282; Mayor *v.* Reynolds, 20 Md., 10; State *v.* Hays, 52 Mo., 578; People *v.* Bank, 24 Wend., 431, and Delafield *v.* State, 26 Wend., 192. He knew with whom, and under whose approval, his original con-

tract was made, and that any subsequent pretended alterations made by his conversation and acts with an assistant superintendent, sent there only to see that the original contract was carried out, would not be recognized by the Government. Had the principal been an individual, it is clear he would not have been bound by the act of the assistant superintendent, since it must have been evident to General Hawkins, or to any reasonable man, that this action was not within the general course or scope of the assistant superintendent's authority. He was there to see that such contract as the Secretary of the Treasury *did* approve was faithfully carried out; not to make a new one for that officer. As well might a mere time-keeper assume to change a contract for eight hours' daily labor by demanding ten as a day's work, or to increase the *per diem* to be paid the laborers. If the person in actual charge of the lot and foundation refused to receive the rubble tendered by General Hawkins under his contract, the same being strictly in conformity thereto, the contractor would have had a good cause of action and the United States would have been liable for this refusal of its officer, because done within the scope of his real or apparent authority.

Though he could not change the contract, it was part of his duty to see that it was carried out and that the materials tendered were in accordance with its terms and equal to the sample. Thus the assistant superintendent might, if *honestly mistaken* in refusing proper material, (for a *wilfully* wrongful act would not create a liability upon the part of the United States; Gibbons's case, 8 Wall, 274,) subject the United States to expense, but *not so as to increase the cost of the material actually put into the building*, nor so as to cause the completed

structure *itself* to exceed the limitation imposed by Congress. It would be an expense arising incidentally out of the subject—the price of making even an honest mistake within the scope of his duty—and not a direct increase in the cost or value of the edifice, while the substitution of dimension-stone for rubble would, if the United States could be held to pay the difference in value, be a direct augmentation of the cost of the building itself, and of the material thereof. "That a special agent cannot bind his principal by any act in excess of his authority, and that persons dealing with such an agent do so at their own risk and peril, and are bound to examine and ascertain the precise extent of his authority, are propositions too long and well settled to admit of controversy, and their correctness is recognized in the foregoing and numerous other authorities; and this doctrine is especially reasonable and pertinent where the delegation of power is contained in public votes or other records or instruments readily accessible." (Ladd *v.* Franklin, 37 Conn., 62, and numerous cases there cited.) Mr. Thomas, as General Hawkins well knew, was not sent to Raleigh to make contracts, but to see that work already contracted for was properly done. If he received stone of inferior quality, or rejected that which was equal to sample, the Government must bear the loss thus occasioned by an act within the scope of his authority, and so far the Court of Claims has gone in its judgment, of which the United States do not complain. This is the extent of our liability, assuming that Mr. Thomas rejected the stone offered because not up to the contract standard. Whether this was the reason for his action, or whether he thought a better stone than that stipulated for was desirable, does not appear in the find-

ings of the court. Every officer is presumed to do his duty, and it is therefore fair to assume that Mr. Thomas rejected the stone offered because he thought it did not answer the call of the contract. Had the agreement left the matter to his determination, his decision would perhaps have been final in the absence of fraud. (But see *contra*, Glacius *v.* Black, 50 N. Y., 145.) As it did not, the court had to decide between the conflicting views of the contractor and the assistant superintendent, and adjudged General Hawkins to be in the right in his assertion that the stone first delivered was equal to the sample. There are few subjects connected with the construction of expensive works more prolific of controversy than the proper classification of material; such as whether it should be paid for as solid or loose rock, or as loose rock or earth excavation; or whether a wall is rubble or ranged-rubble, or ranged-rubble or coursed masonry; or whether it is riprap, riprap-wall, or slope-wall, &c., &c.

Thus the first question which arises in this case is, whether Mr. Thomas assumed to dictate the use of a better stone than that specified in the contract; or did he honestly, but mistakenly, suppose that the stone first delivered and rejected was not up to the standard of the contract? The correctness of the judgment of the Court of Claims depends upon the true solution of this question. The petitioner (Record 1, folios 2 and 3) and his counsel (brief, 4 and 5) assume that the assistant superintendent undertook to change the character of the material, and to make a new contract. We have, therefore, hitherto argued upon this hypothesis, and shall add a few words more upon this view before considering the legal result of an honest mistake.

Between individuals, one dealing with a special agent, the extent of whose powers are fully known to him, can set up no claim against the principal for any act done by such agent, or done by himself at the instigation and by the procurement of such agent, which he knows exceeds the power confided to the agent. If carelessly and thonghtlessly done (as in the present case) it is still, in effect, *a legal fraud* upon the principal, whose plans the agent (appointed to carry them into effect) and the contractor (who is to furnish the material for that purpose) combine to defeat, and to injure the principal in his property and rights. Fraud is often a conclusion of law drawn from the inevitable consequence of acts done. (Story *v.* Nor. & Wor. R. R. Co., 24 Conn., 94.) If, as petitioner's counsel argues, (brief, 5, 6,) Mr. Thomas and General Hawkins undertook to make *a new contract* for the foundation-stone, then both did so knowing it to be an act injurious to the United States, which they had no right to attempt. (57 Ill., 450.) It would be a tort. (Gibbons *v.* United States, 8 Wall., 274.) "The fact that the [supposed] contract made related to a subject within the general scope of his powers did not make it obligatory on the appellants, if there was a want of the specific power to make it." (Mayor *v.* Eshback, 18 Md., 282.) Here it was not "within the general scope of his powers" even; it only incidentally related to the construction of the wall Thomas was to see built according to contract. If within his general powers, private instructions would not relieve his principal, as in the case of Pickering *v.* Busk, 15 East, 45, where the defendant gave his servant authority generally to sell horses, (not one particular horse,) but told him not to warrant, yet was held bound by a warranty. If Thomas had been employed to contract for

material for the structure, with instructions to use rubble for the foundation, he might, perhaps, (certainly, if acting for a citizen,) have bound his principal by contracting for dimension-stone, though he thereby violated his instructions; but here he was not authorized to contract for material at all. (Hurlburt *v.* Kneeland, 32 Vt., 318, citing Fenn *v.* Harrison, 3 T. R., 757, &c.) That parties capable of contracting, (if acting for themselves,) like Dermott & Jones, and the other cases cited by petitioner, (brief, 5,) or authorized to contract, (if acting for others,) may make a parol contract subsequent to or modifying a written one, we do not deny, nor are citations necessary to sustain this proposition; but we say that the remark found near the close of the opinion in this Vermont report applies here: "The present case appears to be one of *want of authority* in the agent." (32 Vt., 318.) The rule as to varying written contracts by those subsequently made verbally, to which counsel refers on the fifth page of his brief, is as well and briefly stated, perhaps, in the case he cites from 5 Barn. and Ad., 58, Goss *v.* Nugent, as anywhere; we will therefore quote the passage, rather because we think the succeeding paragraph, which we also give, has a special application to this case than that the rule itself has any. "By the general rules of the common law, if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during the time it was in a state of preparation, so as to add to or subtract from, or in any manner to vary or qualify the written contract; but after the agreement has been reduced into writing, it is competent to the parties, at any time before breach of it, by a new contract

not in writing, either altogether to waive, dissolve, or annul the former agreements, or in any manner to add to, or subtract from, or vary, or qualify the terms of it, and thus to make a new contract; which is to be proved partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what will be thus left of the written agreement. And *if the present contract was not subject to the controul of any act* of parliament, we think it would have been competent for *the parties*, by word of mouth, to dispense with requiring good title to the lot in question, and that the action might be maintained." (5 Barn. & Adol., 64, 65.) The words italicized above indicate the two propositions we wish to emphasize, viz: that the act of Congress governs this contract, and that it was not "the parties" thereto, but an unauthorized subordinate, who undertook to make a new one by parol.

Various provisions of the general statutes are intended to restrict the cost of public edifices to the sums appropriated, by prohibiting the entry into any contract "which shall bind the Government to pay a larger sum," (R. S., § 3733;) by requiring "plans and full estimates therefor" before any new buildings are commenced, and that "the cost of each building shall not exceed the amount of such estimates," (*id.*, § 3734;) and punishing, by fine and imprisonment, every officer who knowingly contracts "to pay a larger amount than the specific sum appropriated for such purpose." (*Id.*, § 5503.)

Not content with these general clauses, Congress expressly directed the Secretary of the Treasury to superintend the expenditure of the money appropriated for the erection of this building, to cause plans and specifications to be prepared for the purpose of determining

its character, and confining its cost within the sums appropriated. (See the acts first printed at commencement of this brief.) Thus by express enactment the Secretary himself is pointed out as the only person to contract for the Government; the plans and specifications, so prepared by his direction, become the law to all parties. He was to do something more than to contract. He was to determine, *quasi* judicially, according to what plans and specifications the building could be built within the limitation of the acts authorizing its construction. That judgment could not be reversed, nullified, nor defied by any contractor, with or without the assent of some time-keeper or other subordinate, so as to give any just claim against the Government. To call attention to and fix the binding character of his determination, it was specifically "further covenanted and agreed, by and between the parties hereto, that this contract shall be valid and binding when approved by the Secretary of the Treasury, and *not otherwise*, and *no departure from its conditions shall be made without his* WRITTEN *consent.*" (Record, 4, folio 10, last clause of contract.) All the cases cited by Colonel Totten declare that *parties* to a written contract for labor, &c., may change it by parol. He might have filled up a larger brief with similar citations; but the conceded rule does not help his case. Who were "the parties" to this contract? The United States upon the one side and Philemon B. Hawkins upon the other. The former could only contract by an *authorized* agent. By act of Congress the Secretary of the Treasury, and he alone, was constituted such agent for this particular purpose. By his approval, August 1, 1874, he made one contract with Mr. Hawkins; and *these parties never made any subsequent*

one, by parol or otherwise. That there was ever any *express* promise to pay more than the original contract-price for the stone delivered is not pretended. It is only claimed to arise by implication of law. But there can be no implied promise where there is an express one. (Story on Cont., § 18; Whiting *v.* Sullivan, 7 Mass., 107; Creighton *v.* Toledo, 18 Ohio St., 451; Galloway *v.* Holmes, 1 Doug., 330; Weston *v.* Davis, 24 Maine, 374; Britton *v.* Turner, 6 N. H., 491, and books *passim*.) *Nor where the persons from whose action it is sought to be implied are incapable of making an express one.* (Simpson *v.* Bowden, 33 Maine, 552, top.)

To sustain such an axiom as that an express promise excludes all implication, no citations were necessary; but one of the foregoing cases also affirms a proposition as well established as this, though less frequently applied, to wit, that an assumpsit will not be implied against the express declaration of the party sought to be charged, made at the time of the supposed assumpsit. (Whiting *v.* Sullivan, 7 Mass., 107, 109.) That doctrine applies to the present case, as does that above quoted from the opinion in Goss *v.* Nugent, 5 B. & Ad., 65, to the effect that all talk occurring before the written instrument is complete and effective is merged in that document upon its completion.

The delivery of this stone began in May, 1874, and ended in August of that year. (Record, 6, folio 15, finding 2.) Over three-quarters of it were taken and paid for before the contract received the written approval of the Secretary, requisite for its validity, which was affixed August 1, 1874; 650 yards having been delivered before that date, and only 200 subsequently to it. (See vouchers; Record, 8–10.) The prior deliveries of

and payment for rubble-stone, at $5 per yard, were ratified by that approval. It was a declaration of the Secretary, then made, that he assented to and approved of the claimant's proposition to deliver that class of stone at that price.

Departing from this written agreement, we have no fixed contract at all. The claimant hardly feels certain as to the person from whose conduct the supposed obligation of the United States arises. If anybody else besides the Secretary could contract for the materials to go into this building, who was it? Was it, as claimant appears to imagine, anybody who happened to have any duty whatever assigned him to perform for the Government? Could Mr. Hearne, the superintendent; Mr. Thomas, the assistant; Mr. Mullett, the Supervising Architect of the Treasury, and the "one Mr. Oakshott," who, in August, 1874, was sent by the architect "to examine the work and put the superintendents right on it," each of them bind the United States by any agreement as to character or price of the articles to be used in the construction of that building? If either of them could, which one? If neither could alone, could they all, acting together? How can the assent of three more unauthorized persons give any validity to the entirely unauthorized act of another incapable of contracting? The power to ratify necessarily supposes the power to make the contract in the first instance. (Zottman *v.* San Francisco, 20 Cal., 96.) In a case already cited, the court of Missouri observed that "the governor himself was but an agent, and as he had no power to make the contract he was therefore incapable of ratifying or confirming it." (State *v.* Hayes, 52 Mo., 580.) If Mr. Thomas could make a contract for ashlar in the first place, it re-

quired no ratification; if he could not, there is nothing to show that Hearne, or Mullett, or "one Mr. Oakshott" could. But the contrary appears, and if they could not originally contract for it their assent to its use "in August, 1874," after the Secretary had approved this contract for rubble, already delivered, cannot raise any implied assumpsit upon the part of the United States. (See Nottman *v.* San Francisco, 20 Cal., 96, cited *supra*—a very strong, well-reasoned case unauthorized substitution of a stc one to an iron fence.)

What is it that the claimant st stead of a contract for work to be done, according to plan and specification agreed upon, here is an agreement which authorizes the parties to abandon the plan and specification which they have just declared they had adopted, and execute the work according to future directions for a fair and reasonable allowance," &c. * * * "That is, the parties are to be remitted to the remedies resorted to where there is no express but only an implied contract, a *quantum meruit* or *quantum valebat.* It is impossible to find in the resolution any warrant for these extraordinary clauses of the articles. The appellants never designed to commit the credit of the city to the custody of the city commissioner, to be pledged at his discretion, in the erection of any alterations and improvements, without plan, specification, or price previously ascertained and agreed on. They did not delegate to him the amount to be paid for the work, except in the manner prescribed by the resolution." * * * "'The most guiding principle in the construction of powers is to be derived from a consideration of the purpose which the agent or depositary of power is appointed to accomplish.'" (Mayor, &c., *v.* Reynolds, 20 Md., 9, 10.)

This quotation would apply had the Secretary himself attempted verbally to authorize a departure from the plans and specifications required by the act of Congress. Even he would have had no unlimited power thus to proceed and pledge the public credit. But if he could not, *a multo fortiori*, the mere subordinate, placed there to carry out and not to thwart the agreement of the Secretary, could not do it. Reference to "the most guiding principle in the construction of powers" shows that Mr. Thomas exceeded his *if* he attempted to change the contract; nor could Messrs. Mullett, Hearne, and Oakshott, jointly or severally, ratify the unauthorized act.

"In the first place the contract confers no power upon the architect to change or alter the plans and specifications, nor is there any provision, found in many such contracts, that the decision of the architect shall be final and conclusive upon the defendant. The contract provides 'that the materials to be furnished shall be of the best quality, and the workmanship performed in the best manner, subject to the acceptance or rejection of Edward Wall, architect, and all to be in strict accordance with the plans and specifications, which are signed by the party of the second part and form part of this contract.' The architect also had power to reject any particular work or materials, and in such case the builders were to remedy the defects. This was all the authority which the architect had under this contract, and *his authority was equally known to both parties.* It is quite clear to my mind that *the acceptance of the work by the architect did not relieve the plaintiffs from their agreement to perform this work according to the plans and specifications.*" (Per Church, C. J., in Glacius *v.* Black, 50 N. Y., 150.)

So, we repeat, the question is not whether the United States could have made a different contract from that first settled upon with General Hawkins, for this is indisputable. But we say that the United States, (by congressional action or otherwise,) and the Secretary of the Treasury in its behalf, *did not* make any subsequent agreement, and that Mullett, Hearne, Thomas, and Oakshott *could not*. That the whole transaction, so far as it did not conform to the contract, was unknown to the Secretary of the Treasury is expressly stated in the opinion, (Record 15, folio 29, last paragraph,) and is evident from his approving the original contract of May 15, 1874, on the first day of August following, and from the vouchers paid at that Department.

Most of the cases mentioned upon the fifth page of counsel's brief are singularly inapt to support his cause. All of them, except the two in 2 Wall., relate to the acts of the original parties as tending to vary a contract between them, and nearly all are to show that bonds, &c., may be discharged without resort to a sealed instrument, or that one entering upon land under a license is not liable as a trespasser for acts done prior to its revocation. Not one of them intimates that one employed to supervise a strict performance can change his employer's contract. Of the two cases in 2 Wallace, the first only holds that the quartermaster, authorized to receive delivery of corn, might accept it after the contract date, on the old principle that time was not of the essence of the contract. It does not say that under a written contract with the Secretary of War, (stipulating for no departure from it without his assent,) for corn at a dollar a bushel, a quartermaster could accept meal at a dollar and a half.

In the other (Buckley's) case, this court found him entitled to recover under the original agreement, and not independently of it, for work done and expense incurred in strict accordance with the requirements of its fourth article.

The idea that—the fact of the substitution of a more expensive material having been kept from the Secretary of the Treasury even to this day, (for aught that appears,) and vouchers for "rubble" being returned monthly to his Department—the United States is legally or morally liable because it has not torn down its costly edifice in order to remove and return to General Hawkins the stone constituting its foundation, needs no refutation. Allowing the building to stand, under these circumstances, can hardly be construed into an acceptance of this stone as and for anything else but rubble. (See opinion of Field, C. J., in Nottman *v.* San Francisco, 20 Cal., 96, 105, par. 2, near the bottom of that page, and especially page 107; Smith *v.* Brady, 17 N. Y., 173, approved in Harris *v.* Rathbun, 2 Keyes, 312, in an opinion per Hunt, J.)

If a man comes upon my premises to set glass, and while I am at my office puts in plate-glass, though I have told him to use only common glass in my kitchen, I do not think I am liable to him after I have paid and he received the stipulated compensation for that which I did order, even though my colored cook or housemaid did say she preferred plate-glass, and I allow the light to pass through it after it is put into the window, nor do I think it would affect my legal liability even if I did direct my cook or housemaid to show the glazier in what window there was a defective or deficient pane.

We conclude, then, that if Mr. Thomas and General

Hawkins agreed to substitute a better stone than that approved of and contracted for by the Secretary of the Treasury, it was an unauthorized arrangement, and gives no right to increased compensation. (20 Cal., 96.) Knowing the extent of Thomas's power, General Hawkins furnished the better stone in his own wrong, and cannot now recover. (Dart *v.* Hercules, 57 Ill., 446, 450.)

II.

Instead of an attempt to substitute a better stone than the contract required to be used, suppose (as we sincerely believe was the actual fact) Mr. Thomas was acting under an honest mistake, and under a belief that the stone General Hawkins first tendered was not up to the contract standard, and rejected it for that reason, and received that subsequently supplied only as a fair compliance with the terms of the contract, what would be the rights of the parties under this state of facts?

There are some instances where the distinction between rubble and ranged rubble, and between the latter and ashlar, grows shadowy and ill-defined, though ordinarily sufficiently well marked. The second and third findings of the court (Record, 6, 7, folio 15) indicate a disagreement between Messrs. Thomas and Hawkins as to proper classification of the stone first tendered and its answering the call of the contract, rather than an agreement for the substitution of a better article. There is nothing *in the "findings of fact"* to indicate that Mr. Thomas intended to improve on the contract-stone. The court find it was, "in fact, a ranged rubble." (Record, 6, last words on page.) By the advertisement for proposals, made part of the contract, the rubble-stone was to be "flat on the bed," breaking "with a clean, square

fracture; one-quarter to be bond-stones, of a length equal to the thickness of the walls, and to contain not less than ten cubic feet. No stone containing less than 1½ cubic feet, or less than twelve inches thick, will be received." (Record, 10; finding 9.)

These requirements, especially that the stone be flat on the bed and cleave with a clean, square fracture, might well indicate that, though designated as rubble, some care was to be used in its selection, so as to secure a superior wall. We respectfully suggest that the learned judge who drew the opinion below is not quite accurate in his statement, found near the bottom of page 12 of the Record, (nothing of the kind is stated in the findings of fact, so this court is not controlled at all on this point,) that "rubble-stones are rough, irregular stones, such as are found in quarries that furnish small and inferior stone only, or are the remains in ledges from which dimension or other large stone have been taken; and when used for constructing walls they are not dressed, hewn, or cut, and so *lose none of their measurement in laying.*" This last expression we object to as incorrect, because it has led to an unjust allowance in this case. It would imply that, because not dressed into a rectangular shape, they were, under this contract, to be laid precisely as taken from the ground or quarry. If this were so, then their measurement as delivered would be identical with that after they were in the wall, and the allowance here made for wastage would be proper, since the knocking off of any part would be unauthorized; but the provision in the contract for "the stone to be measured in the wall, *net measurement only to be allowed,*" (Record, 3, folio 7, bottom,) shows that it was expected that protuberances in the stone were to be

knocked off, so as to make it "flat on the bed," "with a clean, square fracture." Such preparation of the stone is usually necessary for rubble-work, beside being thus specially recognized here. Professor Wheeler, in his work on Civil Engineering, just published, says (on page 239, bottom, paragraph 324,) of rubble-work: "The stones used are of different sizes and shapes, *prepared by knocking off all sharp, weak angles of the blocks with a hammer.*" He then adds: "If laid without reference to their heights, the masonry is known as uncoursed rubble, or common rubble masonry." Upon the next page, (240, § 325,) he says: "When the stones are laid in horizontal courses, and each course leveled throughout before another is built upon it, the work is termed coursed rubble." Notice that the several courses need not be of uniform thickness.

The claimant acquiesced in the wall measurement, and the rejection of the portion knocked off, originally claiming but 767 cubic yards; and it was only by amendment, and probably upon suggestion of counsel, that he subsequently claimed 965 yards. (Record 5, folio 12.)

As this contract was for the stone, and not for the erection of the wall, there is no express statement of the kind of foundation to be put in; but the assistant superintendent might well construe the requirements of the advertisement as demanding stones which could be laid in courses. The statement of facts indicates that this was the exercise of his judgment, and if there are any expressions tending to the contrary theory in the opinion, we will remark that this court has always refused to receive any assistance or guidance, or information as to the considerations influencing the court below, from this source.

But if the demand for different stone from that offered was with the deliberate purpose of securing a better material than the contract gave, then it was the tortious, fraudulent act of the agent, acquiesced in by the claimant, and bars any recovery whatever.

Under no legal construction put upon the facts proved can Mr. Hawkins claim more than the judgment below gave him, nor was he entitled to all of that.

He tendered fifty cubic yards in May, 1874, before his contract became effective by the requisite approval. If the written contract dated May 15, 1874, then had no force, there was *no* agreement or obligation to receive *any* stone from him, and consequently no liability for a refusal. If it had taken effect, compliance with its terms was obligatory on both parties. The court do not find that this stone, so delivered, was according to the contract, but only that it was "such as came within the description and standard of the smaller-sized stone required by the contract." (Record 6, finding 2.) The court makes *no finding at all* as to the 230 cubic yards of rubble which the claimant then "had quarried and ready for transportation and delivery." (Record 7, top.) It is nothing but the merest conjecture to suppose that this last lot, ready in May, 1874, at the quarry, (and therefore open to the same remarks as the fifty yards delivered, as to the applicability to it of the unapproved contract) was, as required, "flat on the bed," and of the specified dimensions, "no stone containing less than one and a half cubic feet, or less than twelve inches thick." (Record 10, finding 9, bottom.)

If we *guess* (for we can do no more) that it was like the fifty yards delivered, then it contained no "bond stones, of a length equal to the thickness of the walls, and to

contain not less than ten cubic feet." (*Ib.*) The contractor had no right to deliver all the small stone before delivering any of the bond-stones. To do so would delay the work; and that it was to progress during delivery is evident from the amount being estimated at "one thousand cubic yards, more or less," instead of a definite quantity, and from claimant's proposal "to furnish the 'rubble-stone' necessary in building the court-house and post-office." (*Ib.*) It will be observed that nobody except Mr. Thomas ever passed upon the suitability to the contract of the fifty cubic yards delivered and removed; and *neither he nor any other officer of the Government ever saw or had an opportunity of passing upon the other* 230 *yards at the quarry.* In other words, *it was never tendered at the contract-place of delivery.* Messrs. Hearne, Oakshott, and Mullett saw the stone which *was* put into the wall, and concluded that *it* was better than the contract contemplated; (Record 7, finding 4;) but they never saw that which was rejected, nor did either of them say that this, or the 230 yards never delivered, were up to the standard. If that ultimately furnished was superior to the stone called for by the contract, it by no means follows that the fifty yards offered, and the 230 yards quarried, answered its call. It is singular that the stone for which he says the United States owe him and the court award him $1,055, was only worth $456.80 in the market. (Record 7, finding 5.)

To entitle him to a recovery, the claimant should have *tendered* at Raleigh the 230 yards quarried, and proved that it was according to contract. The United States cannot be said to have refused what was never offered.

Therefore, the judgment against the United States for these items was not warranted by the law applicable to

the facts; but no appeal was taken because we did not wish to insist upon the tender, nor that he should suffer any actual loss as to stone, which General Hawkins says he *intended* should answer the contract; if he suffer one by wrongfully substituting a stone which he says he knew all the time was not required by the contract, nor desired by the Secretary of the Treasury, that is his own affair and no fault of the defendants.

We refer briefly to this branch of the case because a determination of the course proper for General Hawkins to have pursued not only shows he had no right to recover for the 230 cubic yards not tendered, but none to recover any more than the contract-price for that actually used. A certain material was agreed for; he tendered it, we will say; it was refused; thereupon his right of action became perfect and the rule of damages fixed. There was no power to compel him to furnish a different or better stone if he could prove that which he offered was in accordance with the terms of his contract; in which case he would have recovered such sum as would fully compensate him for the defendants' unauthorized refusal. Instead of doing this he chose to comply with the request of Mr. Thomas; "while maintaining that he *thought* the stone he had delivered was up to the contract," (indicating that this was disputed and Thomas thought otherwise,) "expressed a *willingness* and *desire* to furnish such material as would give perfect satisfaction to the Government and its agents." (Record 7, finding 3.) The next finding, (4,) upon the same page, states that "from time to time the claimant, in the presence of the assistant superintendent and of the superintendent, asserted that he was *required* to furnish a superior stone to that required by the contract;" but it was not till August

1874, after two-thirds of the stone had been received, that he ever "announced his intention to make claim for extra allowance." (*Ib.*) This all shows that he fully understood that the stone was accepted only under the written contract. If the theory now adopted of an independent parol contract for a better stone had been in his mind at all, he would have had no occasion to complain or protest, since he would have been furnishing stone at its fair value, as that might be subsequently ascertained. All he said, at least prior to August, 1874, was that he was giving a better article than he needed to do under the contract. How common it is for artisans of every class to declare to their customers that they are doing a better job than was contracted for, without either party supposing this will give a right to extra compensation. The officers claimed the stone used only under the contract; the contractor furnished it only under the contract, complaining simply of the construction put upon it as not sufficiently favorable to him. He grumblingly acquiesced. Can it be now said that there was an *agreement* (*aggregatio mentium*) for a superior stone at a higher price, when it is so evident that the minds of both parties, during all these acts, were wholly directed to the proper fulfillment of the written contract? The most he ever said was that he "intended to make claim for extra allowance;" indicating that he proposed to submit to the generous action of the Treasury Department, and not to assert a legal right.

III.

It is really a continuation of the same line of argument to say that General Hawkins is *estopped* by his acts and declarations to assert now that this stone was

not entirely furnished and to be paid for under the written contract. Although some time in August, 1874, whether 1st or 31st does not appear, though a large part of the stone undelivered July 31 was delivered in the succeeding month, "in the presence of Oakshott, the superintendent, and assistant superintendent," he first "protested that he was required to furnish stone superior to that required by the contract, and announced his intention to make claim for extra allowance," yet it appears that the prior deliveries had been accompanied with an expressed willingness, desire, and intention to furnish such material as would give perfect satisfaction.

No protest, nor suggestion of extra allowance, accompanied the delivery of over three-quarters of this stone. They were not heard until it had been irrevocably appropriated to the erection of the wall. They *never* came to the Secretary of the Treasury, nor to any one till August, 1874; but month after month he signs written declarations, which he knows are to be sent to the Treasury Department, as vouchers for payments made for this very stone, that he has furnished, "rubble-stone," at the contract-price. "The stone was designated therein by the superintendent as 'rubble-stone,' *because he had no room for any other designation under the specifications.*" (Record 7, bottom, finding 6.) Here is a distinct declaration that the superintendent never assumed to have the right to receive anything but rubble, nor to act independently of the specifications by making a different parol contract; for that reason he so designates it, and knowing this, General Hawkins accedes to this designation, and subscribes his name to the statement that he has furnished so much rubble. Upon the strength of that statement he is paid. Concede that the payment

was "on account," so that he can show that more was furnished than he has been paid for, he cannot change his declaration of its character, nor of the price per cubic yard that is to be paid for whatever quantity is supplied, nor that it was delivered under the written contract; certainly he cannot assert fraud or mistake in the classification while he still retains the moneys paid upon the strength of it and of his own assertion of it. Potter *v.* Monmouth Ins. Co., 63 Maine, 443, and cases cited.

When he expressed his willingness and desire to furnish a stone satisfactory to the Government, he should have *then* declared that he would only do so for increased compensation, and that he would not do so under the contract, especially as he knew it was claimed under the contract. "A party does not abandon the security of his contract by consenting that alterations shall be made, unless he is also informed, *at the time of the consent*, that the effect of the alteration will be to increase the expense of the work." Per Lord Tenterden, in Lovelock *v.* King, 1 M. & R., 60.

Not only was the Secretary of the Treasury never informed of any proposed claim for extra allowance, but it was not even hinted to Thomas, or anybody else, till some time in August, 1874. Until then Thomas had a right to suppose and did suppose, no doubt, that though Mr. Hawkins imagined his stone better than ought to be required, yet that he chose to supply it rather than litigate the question, or even take the trouble to refer it to the Secretary of the Treasury, or to the Department. Not only do the receipts of General Hawkins accept and affirm the statement of Superintendent Hearne that the stone is rubble, furnished at $5 a cubic yard, but they

expressly declare that it is delivered and received under the contract of May, 1874, repudiating the idea of any subsequent parol agreement such as is now set up.

The Secretary of the Treasury, so far from being asked to give his consent, written or verbal, to any departure from the original contract, is never informed of any deviation, but the fair implication—indeed, the express statement—of the vouchers sent to his Department here is that the plans and specifications prepared under his direction are being strictly followed. He knows of no substitution of a more costly foundation. In paying for it "*he builded better than he knew.*" He placed an expensive superstructure upon a wall represented to him, by these vouchers and by the contractor's acts and silence, as that for which he contracted, and of which he had approved.

In the language of a case which the appellant cites, "and we think, after he has once clearly signified such relinquishment, whether by words or acts, and suffered other persons to act upon the faith of such relinquishment, and to incur expense in doing the very act to which his consent was given, it is then too late to retract such consent, or to throw on those other persons the burden of restoring matters to their former state and condition." (Liggins *v.* Inge, 7 Bing., 692.) He did nothing when first told to furnish better stone than the lot first delivered, except to say that he *thought* it was according to contract; but that was accompanied with an avowal of his not insisting on that point, but being *willing* and desirous to make the change, so as to satisfy the Government and its agents in carrying out the contract. Having then kept silence as to an increase of price, and acquiesced from May to August (at least) in the recep-

tion of the the sum fixed by the contract, he cannot now be heard to assert anything different. As a statement of the amount received, his receipts were open to explanation. As declarations of the character of the stone and the price he should claim for every cubic yard actually delivered and ascertained as agreed, and that delivery was made under the contract of May, 1874, they bind him. Bigelow on Estoppel, 430, *et seq.*, where that author remarks that "under circumstances which would create an estoppel by conduct, an acknowledgment of the receipt of money or property will become binding even between the parties." Merrill *v.* Ithaca and Owego R. R. Co., 16 Wend., 588–590, cited by Richardson, J., in opinion in the court below.

In the before-cited case of Smith *v.* Brady, 17 N. Y., 190, Comstock, J., concludes the opinion with some remarks as applicable here, where a better material is put in than the contract called for, as there, where there had been a failure to provide as good as had been agreed upon: "But there can be no injustice in imputing to a contractor a knowledge of what his contract requires, nor in holding him to a substantial performance. *If he has stipulated for walls of a given material* and with a hard finish inside, he knows what he is to do, and must perform it. If he has engaged for a given number and size of windows, joists, beams, and sills, he cannot, with the specifications before him, innocently depart from his contract. If he fails to perform when the requirement is plain, and when he can perform if he will, *he has no right to call upon the courts to make a new contract for him*, nor ought he to complain if the law leaves him without remedy." (17 N. Y., 190.)

The United States, through its *only* authorized agents, having spoken plainly, and the contract being unusually explicit and strict as to any departure from its conditions, the language of Buller, J., may properly be adopted as the legal conclusion of an examination of the appellant's case. "The result of my opinion is that, as between these parties, the plaintiffs have no conscience or equity, and that the defendants are not under any legal or moral obligation whatever to pay the amount of this bill." (Fenn *v.* Harrison, 3 T. R., 761, cited *ante.*)

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